Supreme Court, U.S.
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No. 06-

In The

Supreme Court of the United States

MARIANNE SAWICKI,

Petitioner,

v.

MORGAN STATE UNIVERSITY
and STATE OF MARYLAND,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under Title VII of the 1964 Civil Rights Act, if an employee is dismissed or otherwise injured as the result of the intentionally discriminatory actions of an official who exerted substantial influence over the employment decision involved, may the employer avoid liability by showing that a different official was the ultimate decisionmaker?

PARTIES

The parties to this action are set forth in the caption.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Marianne Sawicki respectfully prays that a writ of certiorari issue to review the judgment opinion of the United States Court of Appeals for the Fourth Circuit entered in this case on March 1, 2006.

OPINIONS BELOW

The March 1, 2006 opinion of the Fourth Circuit, which is not officially reported, is set forth at pp. 1a-2a of the Appendix. The April 3, 2006, order of the Fourth Circuit denying rehearing and rehearing en banc, which is not reported, is set out at pp. 41a-42a of the Appendix. The August 2, 2005, Memorandum Opinion of the United States District Court, which is not officially reported, is set forth at pp. 3a-40a of the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals was entered on March 1, 2006. A timely petition for rehearing and rehearing en banc was denied on April 3, 2006. On June 21, 2006, the Chief Justice granted an order extending the time for filing the petition until August 31, 2006. (No. 05A1183). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 703(a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1), provides in pertinent part:

> It shall be an unlawful employment practice for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against

> any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race color, religion, sex or national origin.

STATEMENT OF THE CASE

This is a Title VII case by Dr. Marianne Sawicki against Morgan State University ("MSU"), an historically black university in Baltimore, Maryland. The complaint alleged that Dr. Sawicki was denied tenure, and ultimately dismissed, because of her race and sex. The complaint and discovery set forth detailed allegations that the dismissal and denial of tenure were orchestrated by the Chair of plaintiff's department, and by the Dean of the Liberal Arts College, because Dr. Sawicki is a white woman. The district court dismissed the action; it held that "the alleged discriminatory behavior of the Chair and Dean is immaterial" (App. 24a), applying the Fourth Circuit decision in *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277 (4th Cir. 2004) (en banc), *cert. dismissed*, 543 U.S. 1132 (2005). The district court reasoned that under *Hill* MSU was legally responsible only for discrimination by the President or Vice President of the university. The Fourth Circuit affirmed "on the reasoning of the district court." (App. 2a).

Dr. Sawicki was hired by MSU in 2000 to teach in its Department of Philosophy and Religious Studies. When she applied for tenure, Dr. Sawicki had published eight books, and in that respect was among the most distinguished faculty members at MSU. Morgan State denied Dr. Sawicki's tenure application in 2002 and terminated her in June 2003.

The tenure determination process at MSU was a multi-tiered procedure that took place over several months, involving: (1) advice to the Chair from a department review committee (of which the Department Chair was the chairman), (2) a recommendation by the Department Chair, (3) a recommendation by a college-wide review committee, (4) a recommendation by the Dean of the College of Liberal Arts, (5) a recommendation by the vice-president of Academic Affairs,[1] and finally (6) a decision by the president. (App. 7a-8a).

Different degrees of inquiry are mandated at each level of the process. The Chair and department review committee are to "conduct independent evaluations of all the material" in the applicant's dossier. The Dean and college committee are only required to "examine all materials." The vice-president is directed merely to "review the recommendation of the Dean."[2] The president testified that he does not look at the material in a tenure file.[3]

In this case the Department Chair played a particularly pivotal role in the process.[4] In addition to his own recommendation, the Chair was the only member of the "department review committee" who was actually a member of the Department of Philosophy and Religious Studies. As such, and because he often was the only member of the committee with personal knowledge of critical facts, the Chair had particular influence over the

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[1] The district court opinion refers to the vice-president by the initials VPAA.

[2] Second Amended Complaint, Exhibit 9.

[3] Plaintiff's Exhibit 7 at 237-8.

[4] The Chair's key role in the process is detailed in the Plaintiff's Opposition to Defendants' Motion for Summary Judgment, pp. 7-20.

committee,[5] each of whose members he had selected. The Chair also played a key role in affecting what materials were included in, or excluded from, Sawicki's tenure file. The vice-president's recommendation expressly relied heavily on information that had been provided by the Chair.[6]

As the district court noted, the complaint and discovery were "brimming with allegations of discriminatory behavior" by the Chair and Dean. (App. 24a).[7] "[P]laintiff asserts direct evidence of racial discrimination by [the Chair]."[8] The complaint and record evidence asserted that the Chair took a number of prejudicial actions in order to prevent Sawicki, because she was a white woman, from obtaining tenure. In addition to recommending that Sawicki be denied tenure, the Chair swayed the department review committee (of which he was the chairman) to make a similar recommendation. The Chair allegedly provided false information to the committee members, and placed inaccurate prejudicial information in Sawicki's tenure file. The Chair assertedly withheld from the file or from the committee information that would have been

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[5] One committee member, in his written evaluation form, stated, "I defer my final decision on the judgment of the Chairperson of the Department of Philosophy and Religious Studies." Plaintiff's Exhibit 45.

[6] Defendants' Exhibit 19.

[7] *See* Second Amended Complaint, par. 18-48; Plaintiff's Exhibit 6 (affidavit of Marianne Sawicki); Memorandum Opinion, March 15, 2004, at 2-3. The Chair was the only white department chair in the College of Liberal Arts; the complaint alleged that the Chair's opposition to Sawicki's tenure application derived from the complex racial politics of the university.

[8] Memorandum in Support of Defendants' Motion for summary Judgment, 12.

favorable to Sawicki. Dr. Sawicki claimed that the Chair intentionally created problems which he then blamed on her. Finally, although the Chair was required by MSU procedures to notify Sawicki if he made a negative recommendation, the Chair improperly failed to do so.[9]

The Chair and the department committee (which he chaired) recommended a denial of tenure. Sawicki's case was next considered by the college-wide committee, which concurred in that recommendation.[10] The Dean recommended against an award of tenure at that time; the complaint and other record materials contain substantial allegations that the Dean too acted with a discriminatory purpose.[11] The Dean also recommended that MSU defer the final tenure decision for a year.[12] The vice-president and the president of MSU accepted the Dean's recommendations.

MSU conditioned the deferral on Sawicki's agreeing to several express disputed "conditions."[13] Because the problems raised by those conditions were not resolved,[14] the deferral

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[9] Second Amended Complaint, par. 18-48; Plaintiff's Exhibit 53.

[10] The Recommendation Form used by the committee asked only that the committee vote "yes", "no" or "abstain" on awarding tenure; the form did not ask the committee members to consider the possibility of instead deferring a final decision on tenure. Plaintiff's Exhibit 51. In her individual written evaluation, one committee member suggested that deferral should be considered. Plaintiff's Exhibit 52 (form completed by Meena Khorana).

[11] Second Amended Complaint, par. 49-57.

[12] Plaintiff's Exhibits 42, 51-A; Defendants' Exhibit 18.

[13] Defendants' Exhibit 21.

[14] The deferral offer gave Sawicki 10 days to agree in writing to MSU's conditions. Defendants' Exhibit 21. Sawicki responded in writing, seeking clarification of those conditions, asking for certain relevant information, and specifically requesting that the deadline be

(Continued on following page)

was not implemented. The decision to deny tenure, the Chair's original recommendation, thus went into effect. Sawicki's subsequent internal appeals were unsuccessful, and her employment ended on June 10, 2003.

Dr. Sawicki filed suit against MSU and several MSU officials on a number of grounds, including a claim that she had been denied tenure and dismissed because of her race and gender in violation of Title VII of the 1964 Civil Rights Act. The complaint contained detailed allegations of discriminatory and prejudicial actions by the Chair and Dean, but no similar allegations regarding the president and vice-president.

After the completion of discovery, MSU moved for summary judgment on the Title VII claims. MSU argued that discriminatory motivation on the part of the Chair[15]

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extended until MSU had provided that clarification and information. Plaintiff's Exhibit 54.

MSU never responded to the request for additional information or for an extension of time. In late September, 2002, when Sawicki re-applied for tenure, MSU replied that because Sawicki had not within the original 10 day period agreed to its conditions, her application for tenure had been denied, not deferred, and she was thus ineligible to reapply for tenure. Defendants' Exhibit 22.

[15] The motion itself stated:

> Plaintiff cannot prove that the University's acceptance of Dean Hollis' recommendation and tenure denial were a pretext for racial and gender bias. While plaintiff alleges direct evidence of discrimination by Dr. Begus, her Department chair, she cannot establish that he was the primary decision maker in the promotion and tenure case. *See Hill v. Lockheed Martin Logistics Mgmt., Inc.*

Defendants' Motion for Summary Judgment, 1-2.

Memorandum in Support of Defendants' Motion for Summary Judgment, 23 ("Even if [the department Chair] Begus had 'a substantial influence on the ultimate decision' or 'played a role, even a significant one,

(Continued on following page)

and Dean[16] was legally irrelevant because the final decision to deny tenure had actually been made by the president on the recommendation of the vice-president. MSU relied heavily on the Fourth Circuit decision in *Hill v. Lockheed Martin Logistics Mgmt, Inc.*, 354 F.3d 277 (4th Cir. 2004) (en banc), *cert. dismissed*, 543 U.S. 1132 (2005), which held that an employer is liable only for discriminatory acts by the final decisionmaker. MSU's evaluation of the record focused on its contention that there was insufficient evidence to support a finding that the president or vice-president had acted for an unlawful discriminatory purpose.

The district court concluded that it was required to grant summary judgment in light of "the constraints of *Hill's* actual decisionmaker test." (App. 31a). The district judge recognized that the *Hill* standard had been rejected by the Seventh Circuit (App. 20a n.13), but acknowledged that he was required to apply the Fourth Circuit standard.

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in the adverse employment action,' Begus' actions cannot be imputed to the University because that would improperly 'impute the discriminatory motivations of subordinate employees having no decisionmaking authority to the employer. . . .' *Hill*").

Defendants' Reply Memorandum in Support of Motion for Summary Judgment, 5 ("Begus' alleged conduct or statements . . . are immaterial to the ultimate issue of discrimination. *See Hill*.").

[16] Memorandum in Support of Defendants' Motion for Summary Judgment, 16-17 ("Even if it is assumed that Dean Hollis' recommendation was tainted with racial and gender bias, such prejudice cannot be imputed to [the vice-president] because she did not rubber stamp his recommendation but performed an independent evaluation of plaintiff's dossier. . . . 'Regarding adverse employment actions, an employer will be liable not for the improperly motivated person who merely influences the decision, but for the person who in reality makes the decision.' *Hill*").

> Where a plaintiff seeks to attribute her supervisor's discriminatory conduct to her employer, the Fourth Circuit now applies a particularly rigorous standard. *Hill v. Lockheed Martin Logistics Mgmt., Inc.* . . . . [A] Title VII plaintiff "must come forward with sufficient evidence that the [allegedly discriminating] subordinate employee possessed such authority as to be viewed as the one principally responsible for the decision or the actual decisionmaker. . . ." *Id.* at 291. . . . [D]iscriminating employees who are subordinate to the actual decisionmaker are not "principally responsible" for the decision "simply because they have influence or *even substantial influence* in effecting a challenged decision." *Id.* (emphasis added).

(App. 19a-20a).

The district judge candidly recognized that the effect of *Hill* was to deny redress to plaintiffs who were dismissed (or otherwise discriminated against) because of the discriminatory actions of supervisory officials.

> This standard, which this court is clearly obligated to follow, presents a substantial obstacle to the Title VII plaintiff who, as here, alleges that she was terminated because of the discriminatory conduct of her immediate supervisors but struggles to show that the ultimate decisionmaker harbored that same animus. The rule has the unfortunate potential to create a safe harbor for workplace discrimination by any prejudiced supervisor who can fairly be described as not being the final decisionmaker on personnel decisions. Properly applying *Hill's* actual decisionmaker test to Defendant MSU's multi-tiered tenure application process shelters the alleged discriminatory acts of Plaintiff's immediate supervisors from this Court's analysis unless these discriminatory

> acts can be fairly attributed to the actual decisionmakers.

(App. 20a) (footnote omitted).

The district court did not question the sufficiency of the evidence to support Dr. Sawicki's claims that the Chair and Dean had brought about her dismissal by making biased recommendations, by providing false information, by suppressing favorable information, and by deliberating creating problems for which they then blamed the plaintiff. (App. 10a-11a, 24a). The district court concluded that those allegations – even if proven – were insufficient to establish liability.

> Applying *Hill* to these facts, it is clear that only the President and VPAA can be considered the actual decisionmakers. . . . Under *Hill*, neither the Chair nor Dean can reasonably be considered actual decisionmakers.

(App. 21a) (footnote omitted). Thus, the court ruled, "the alleged discriminatory behavior of the Chair and Dean is immaterial." (App. 24a). With the discriminatory motives of the Chair and Dean therefore deemed irrelevant as a matter of law, the court limited its inquiry to whether there was evidence that the vice-president and president had *also* acted with an unlawful purpose.[17] The district court concluded that the vice-president and president, in relying on the information presented by and the recommendations of the Chair and Dean, had not themselves acted with a discriminatory motive. (App. 25a-31a, 32a).

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[17] "Plaintiff must provide a factual basis from which a reasonable juror could conclude that the President and VPAA were motivated by unlawful discrimination when they made their tenure decision." (App. 25a) (footnote omitted).

On appeal, MSU again relied on *Hill*, and argued that there was no evidence that the president or vice-president had acted with a discriminatory purpose.[18] The Fourth Circuit affirmed "on the reasoning of the district court." (App. 2a). Sawicki filed a timely petition for rehearing and rehearing en banc, asking the Fourth Circuit to reconsider the rule in *Hill*. On April 3, 2006 the Fourth Circuit denied that petition.

On June 21, 2006 the Chief Justice granted Sawicki's application to extend the time for filing a petition for writ of certiorari until August 31, 2006.

REASON FOR GRANTING THE WRIT

THERE IS AN IMPORTANT INTER-CIRCUIT CONFLICT REGARDING WHETHER TITLE VII APPLIES TO ACTION BY AN EMPLOYER THAT IS INFLUENCED BY A DISCRIMINATORY SUPERVISOR

This case presents a mature and clearly recognized inter-circuit conflict regarding the administration of federal employment discrimination statutes.[19] At most

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[18] Appellees' Informal Brief, p. 5 ("The district court should be affirmed because Dr. Sawicki failed to present any evidence of racial or gender animus by [the president] or [the vice-president.")

[19] The instant case arises under Title VII of the 1964 Civil Rights Act. The same issue has also arisen under most other federal employment statutes. *E.g., Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277 (4th Cir. 2004) (en banc) (ADEA); *Mulero-Rodriguez v. Ponte, Inc.*, 98 F.3d 670 (1st Cir. 1996) (ADEA); *Ostrowski v. Atlantic Mutual Insurance Cos.*, 968 F.2d 171 (2d Cir. 1992) (ADEA); *Laxton v. GAP, Inc.*, 333 F.3d 572 (5th Cir. 2003) (Pregnancy Discrimination Act); *Wascura v. City of South Miami*, 257 F.3d 1238 (11th Cir. 2001) (Americans With Disabilities Act).

employers of any size, the decision to take an important personnel action, particularly the decision to fire a worker, often involves several supervisory officials. Higher level officials who may make the ultimate decision typically depend heavily on lower ranking supervisors for information about the worker in question, and for recommendations as to whether actions should be taken against (or in favor of) a particular employee.

Most circuits hold that federal law is violated whenever an employer's decision regarding a plaintiff is *influenced* by a lower level supervisor who acted with a discriminatory purpose. The Fourth Circuit, on the other hand, emphatically rejected that majority rule in its en banc decision in *Hill v. Lockheed Martin Logistics Mgmt. Inc.*, 354 F.3d 277 (4th Cir. 2004) (en banc). *Hill* held instead that Title VII is not violated unless the ultimate decisionmaker personally acted with a discriminatory motive, regardless of whether his or her action was "influence[d] or even substantially influence[d]" by another invidiously motivated official. 354 F.3d at 291.

Certiorari was sought to review the decision in *Hill* itself. (No. 03-1443, October Term 2003). In response to that petition, this Court invited the Solicitor General to file a brief expressing the views of the United States. 542 U.S. 935 (2004). Thereafter the parties in *Hill* reached a settlement, and the case was dismissed pursuant to Rule 46.1 of this Court. 543 U.S. 1132 (2005). The instant case presents the same issue as the petition in *Hill*.

I. THE FOURTH CIRCUIT RULE IN *HILL V. LOCKHEED MARTIN* SEVERELY LIMITS EMPLOYER LIABILITY FOR DISCRIMINATORY ACTIONS BY ITS SUPERVISORS

The inter-circuit conflict presented in this case stems in particular from the controversial 2004 Fourth Circuit decision in *Hill*. The issue in *Hill*, as in the instant case, was whether an employer is liable under Title VII (or, indeed, whether Title VII is violated at all) if the decision to dismiss an employee is caused or influenced by an improperly motivated lower ranking supervisor. 354 F.3d at 289.

The en banc majority in *Hill* rejected the rule, accepted by most other circuits, that an employer is liable in such circumstances. The Fourth Circuit insisted, to the contrary, that the discriminatory motives and actions of subordinate officials could not be imputed to the employer

> simply because they have influence or even substantial influence in effecting a changed decision. Regarding adverse employment actions, an employer will be liable not for the improperly motivated person who merely influences the decision, but for the person who in reality makes the decision.

354 F.3d at 291; see *id.* (employer not liable if a subordinate supervisor "had a substantial influence on the ultimate decision or because he has played a role, even a significant one, in the adverse employment decision."). The Fourth Circuit limited liability under Title VII to cases in which there was a discriminatory motive on the part of "the one principally responsible for the decision or the actual decisionmaker for the employer." 354 F.3d at 291. According to the *en banc* majority, proof that a company official, acting for a discriminatory purpose, in fact

brought about the dismissal of an employee is insufficient to establish a violation of federal law unless that official made "the final or formal employment decision." *Id.*

The majority in *Hill* acknowledged that its decision was contrary to the standard in other circuits. It expressly recognized, for example, that in the Fifth Circuit an employer is liable if a lower ranking supervisor "harboring a discriminatory animus 'had influence or leverage over' the decisionmaking of those 'principally responsible for the adverse employment action.'" *Hill*, 354 F.3d at 290 (*citing Laxton v. Gap, Inc.*, 333 F.3d 572, 584 (5th Cir. 2003)). The Fourth Circuit refused to follow decisions in numerous other circuits because in its view the decisions in those circuits lacked an adequate "discussion of agency principles" and had "not always described the theory in consistent ways." 354 F.3d at 289-90. The original panel decision also recognized the existence of an inter-circuit conflict about this important issue. *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 314 F.3d 657, 669-70 (4th Cir. 2003).

The dissenting opinion in *Hill* emphasized that the standard adopted by the majority was in conflict with decisions in numerous other circuits. "This puts us at odds with virtually every other circuit." 354 F.3d at 299; *id.* at 302 (majority opinion is "out of step with the law in other circuits"), 304 ("[t]he majority . . . rejects the approach of a number of other circuits."). "Most other circuits . . . have held that when the discriminatory bias of a subordinate influences an employment decision, the employer will be charged with the subordinate's bias." 354 F.3d at 302.

The Eleventh Circuit has taken an approach similar to *Hill*, repeatedly indicating that an employer will only be liable for the discriminatory actions of a lower ranking official if the higher ranking official blindly "rubber

stamped" the recommendations of that other official without examining the merits of the proposed employment action.

> [A]lthough causation may be established, even when the person with the unlawful animus is not the decision-maker, the actual decision-maker must have acted in accordance with this person's decision, without the actual decision-maker himself evaluating the employee's situation.

McShane v. U.S. Attorney General, 144 Fed. Appx. 779, 791 (11th Cir. 2005).

> This is not a case in which a plaintiff has created a jury issue with respect to discrimination on the part of a dominant decision-maker whose decision was rubber-stamped by others.

Wascura v. City of South Miami, 257 F.3d 1238, 1247 (11th Cir. 2001); *see Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1249 (11th Cir. 1998) (requiring proof that higher ranking official merely rubber stamped the decision of a lower ranking official.); *Stimpson v. City of Tuscaloosa*, 186 F.3d 1328, 1332 (11th Cir. 1999) (employer liable if titular decisionmaker merely "acted as a . . . rubber stamp for [a third party's] recommendation.").

II. THE FOURTH CIRCUIT RULE IN *HILL* HAS BEEN EXPRESSLY REJECTED BY THE TENTH AND SEVENTH CIRCUITS

The Tenth Circuit recently emphatically rejected the Fourth Circuit standard in *Hill*, which the Tenth Circuit criticized as "extreme." *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476, 487 (10th Cir. 2006).

> [T]he Fourth Circuit has held that an employer cannot be held liable even if a biased subordinate

> exercises "substantial influence" or plays a "significant" role in the employment decision. *Hill*, 354 F.3d at 491. . . . We find ourselves in agreement with the Seventh Circuit, which has rejected the Fourth Circuit's approach as "inconsistent with the normal analysis of causal issues in tort litigation." *Lust v. Sealy, Inc.*, 383 F.3d 580, 584 (7th Cir. 2004).

Id. *Hill* had relied in part on a passage in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000), describing a company official in that case as the "actual decisionmaker." 530 U.S. at 151-53; *see Hill*, 354 F.3d at 288. The Tenth Circuit disagreed with *Hill's* reliance on *Reeves*.

> The Fourth Circuit's strict approach makes too much of the phrase "actual decisionmaker" in *Reeves*; the Court was describing what the petitioner's evidence showed, not prescribing the "outer contours" of liability. . . . The Fourth Circuit's peculiar focus on "who is the 'decisionmaker' for purposes of discrimination actions," *Hill*, 354 F.3d at 286, seems misplaced. The word "decisionmaker" appears nowhere in Title VII.

Id.

On the other hand, the Tenth Circuit in *BCI* also expressly disagreed with decisions in the Fifth and Seventh Circuits which hold an employer liable whenever a biased subordinate has had any "influence."

> Some circuits take a lenient approach, formulating the inquiry as whether the subordinate "possessed leverage or exerted influence, over the titular decisionmaker." *See Russell* [*v. McKinney Hosp. Venture*, 253 F.3d 219,] 227 [(5th Cir. 2000)]. . . . Such a weak relationship between the

> subordinate's actions and the ultimate employment decision improperly eliminates a requirement of causation.

450 F.3d at 486-87. The Tenth Circuit would limit employer liability to cases in which "the biased subordinate's discriminatory reports, recommendation, or other actions *caused* the adverse employment action." 450 F.3d at 487 (emphasis added).

The Fourth Circuit decision in *Hill* has also been expressly rejected by the Seventh Circuit. *Hill* rested its decision heavily on the Seventh Circuit decision in *Shager v. Upjohn Co.*, 913 F.2d 398 (1990), because *Shager* was cited by this Court in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 762-63 (1998). 354 F.3d at 288. But the Seventh Circuit itself does not construe *Shager* as limiting employer liability to intentional discrimination by the formal decisionmakers or by officials who exercise complete control over the titular decisionmakers. In *Lust v. Sealy, Inc.*, 383 F.3d 580 (7th Cir. 2004), Judge Posner, the author of *Shager*, disagreed both with *Hill* and with *Hill's* interpretation of *Shager*:

> We are mindful that *Hill* . . . holds that a subordinate's influence, even substantial influence, over the supervisor's decision is not enough to impute the discriminatory motives of the subordinate to the supervisor; the supervisor must be the subordinate's "cat's paw" for such imputation to be permitted. *That is not the view of this court*, even though the "cat's paw" formula apparently originated in our decision in *Shager*. . . . The formula was (obviously) not intended to be taken literally (Sealy employs no felines), and were it taken even semiliterally it would be inconsistent with the normal analysis of causal issues in tort litigation. If [the higher ranking official] would

> not have turned down Lust for the promotion had it not been for [the lower ranking official's] recommendation, a recommendation that the jury could reasonably find was motivated by sexist attitudes, then [the lower ranking official's] sexism was a cause of Lust's injury, whether or not [the higher ranking official] could reasonably be thought a mere cat's paw.

383 F.3d at 584 (emphasis added).

The Seventh Circuit has repeatedly found liability because an employer's decisions were influenced by the actions of a lower ranking official who, as allegedly occurred in the instant case, had for discriminatory reasons provided false or incomplete information to the actual decisionmaker.[20]

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[20] In addition to *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394 (7th Cir. 1997), the Seventh Circuit reiterated this rule in several other cases:

> [W]e have stated that the retaliatory motive of a "nondecisionmaker" may be imputed to the company where the "nondecisionmaker" influenced the employment decision by concealing relevant information from, or feeding false information to, the ultimate decisionmaker.

David v. Caterpillar, Inc., 324 F.3d 851, 861 (7th Cir. 2003).

> [T]he forbidden motive of a subordinate employee can be imputed to the employer . . . [if] a subordinate, by concealing relevant information from the decisionmaker, is able to manipulate the decisionmaking process and to influence the decision.

Willis v. Marion County Auditor's Office, 118 F.3d 542, 547 (7th Cir. 1997) (citing *Shager*).

> An employer cannot escape responsibility for wilful discrimination by multiple layers of paper review, when the facts on which the reviewers rely have been filtered by a manager determined to purge the labor force of older workers.

(Continued on following page)

> [There is] one situation in which the prejudices of an employee, normally a subordinate . . . , are imputed to the employee who has formal authority over the plaintiff's job. That is where the subordinate, by concealing relevant information from the decisionmaking employee or feeding false information to him, is able to influence the decision. . . . In such a case, the discriminatory motive of the other employee, not the autonomous judgment of the nondiscriminating decision-maker, is the real cause of the adverse employment action.

Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394, 1400 (7th Cir. 1997) (opinion by Posner, J.).

Gusman v. Unisys Corp., 986 F.2d 1146, 1147 (7th Cir. 1993) (citing *Shager*).

In *Dey v. Colt Construction & Development Co.*, 28 F.3d 1446 (7th Cir. 1994), the plaintiff alleged that she had been fired in retaliation for complaining about sexual harassment. The company president who dismissed Dey insisted he was unaware of the complaints and that "the final decision was his alone." 28 F.3d at 1459. But prior to making his decision, the company president had solicited the views of the harassing official, who had commented that Dey's performance

> was unsatisfactory and that Dey should be replaced. Thus, even if [the harasser] kept Dey's sexual harassment complaints to himself, those complaints may have affected [the harasser's] unflattering assessment of her job performance. Summary judgment generally is improper where the plaintiff can show that an employee with discriminatory animus provided . . . input that may have affected the adverse employment action.

28 F.3d at 1459; *see Jardien v. Winston Network, Inc.*, 888 F.2d 1151, 1155 (7th Cir. 1989) (affirming finding of liability because of evidence that the actual decisionmaker "accepted . . . input" from biased official in deciding to fire the plaintiff).

EEOC and commentators have noted the existence of this conflict.[21]

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[21] Brief for the EEOC as Appellant, EEOC v. BCI Coca-Cola Bottling Co., No. 04-2220 (10th Cir), 33-34 n.11 ("At least nine circuits have concluded a subordinate's prejudice is properly imputed to an employer if a biased subordinate substantially influenced the decision or played a role in the decisionmaking process.... Only the Fourth Circuit has squarely ruled to the contrary. *See Hill v. Lockheed Martin Logistics Mgmt., Inc.*")

Comment, *Hill v. Lockheed Martin Logistics Management, Inc.: "Substantially Influencing" the Fourth Circuit to Change Its Standard for Imputing Employer Liability for the Biases of a Non-Decisionmaker*, 73 U.Cin.L.Rev. 1709, 1724-27 (2005):

> The court (in *Hill*) then rejected the "substantial influence" standard ... followed by many courts of appeal.... [T]he other federal circuits examine the biased subordinate's influence on the decisionmaker when determining employer liability. And as the dissenting opinion correctly noted, because the majority in *Hill* did not take the subordinate's influence into consideration, the Fourth Circuit is at odds with the other circuits.

(Footnotes omitted).

Employment Discrimination Coordinator, Analysis of Federal Law, § 11:6:

> There is some dispute among the circuits on the level of control over employment decision required for summary judgment under subordinate bias liability. The lenient approach merely inquires if the biased employee possessed leverage or exerted influence, or had any input into the process. At the opposite end, even a substantial influence is not enough, rather the decisionmaker must be such a cat's paw that the biased subordinate is principally responsible or the actual decisionmaker. In the middle, the biased subordinate must have caused the adverse employment action through his or her discriminatory recommendations, reports or actions. This is beyond mere influence, but less than a principal role.

(Footnotes omitted).

III. EIGHT OTHER CIRCUITS HAVE ADOPTED THE LIABILITY STANDARD REJECTED BY THE FOURTH CIRCUIT IN *HILL*

First Circuit. The First Circuit holds that a plaintiff can demonstrate the existence of unlawful discrimination through evidence of bias on the part of "those in a position to influence the decisionmaker," *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 55 (1st Cir. 2000), the very standard rejected by the Fourth Circuit in *Hill*. In *Santiago-Ramos*, the ultimate decisionmaker, a company vice-president in New Jersey, had dismissed the plaintiff after obtaining information and advice about whether to fire her from the plaintiff's immediate supervisor in Puerto Rico; the First Circuit concluded that a reasonable jury in determining that unlawful discrimination had occurred could rely on evidence of bias by the supervisor in Puerto Rico. 217 F.3d at 55. *See Mulero-Rodriguez v. Ponte, Inc.*, 98 F.3d 670, 676 (1st Cir. 1996) (liability may be established through evidence of bias on the part of an official "in a position to influence" the employer's decision); *Cariglia v. Hertz Equipment Rental Corp.*, 363 F.3d 77, 83 (1st Cir. 2004) ("corporate liability can attach if neutral decisionmakers. . . . rely on information that is inaccurate, misleading, or incomplete because of another employee's discriminatory animus.")

In *Fields v. Clark University*, 817 F.2d 931 (1st Cir. 1987), the plaintiff had been denied tenure by the university's board of trustees, after the plaintiff's department and then a university committee had recommended against tenure. 817 F.2d at 932. The trial court concluded that there was not "any evidence of improper bias in the subsequent review procedure [by the committee] or on the part of the ultimate deciding authority, the board of

trustees." 817 F.2d at 933. The trial judge nonetheless found the university liable because the initial step, the recommendation by the department, was "impermissibly infected with sexual discrimination." *Id.* The First Circuit concluded that such evidence was sufficient to support a finding of liability. 817 F.2d at 935.

Second Circuit. In *Ostrowski v. Atlantic Mutual Insurance Co.*, 968 F.2d 171, 182 (2d Cir. 1992), the Second Circuit held that a jury could base a finding of unlawful discrimination on evidence of discriminatory motives on the part of any "person involved in the decisionmaking process." In that case the company vice-president who made the decision to fire Ostrowski insisted that he had conducted his "own independent review" of the plaintiff's performance; that decisionmaker acknowledged, however, that his information about that performance record had come from the particular supervisor who had made a series of remarks reflecting animus toward older employees. 968 F.2d at 175.

Third Circuit. In the Third Circuit, in order to establish unlawful discrimination "it is sufficient if those exhibiting discriminatory animus influenced or participated in the decision to terminate." *Abramson v. William Paterson College of New Jersey*, 260 F.3d 265, 286 (3d Cir. 2001). In *Abramson*, the ultimate decision to deny tenure to the plaintiff had been made by the college president, who did not act with any personal discriminatory purpose. The court of appeals nonetheless concluded there was sufficient evidence to support a jury verdict in favor of the plaintiff's religious-discrimination claim because there was evidence that a dean and a department chair who had opposed tenure were anti-semitic and that both had played a role in the tenure decision. "A reasonable inference could

be drawn that [the president] was influenced by both [the dean and the chair]." 260 F.3d at 285.

In *Roebuck v. Drexel University*, 852 F.2d 715 (3d Cir. 1988), the university president had denied the plaintiff tenure after negative recommendations by the relevant department chair, a dean, and vice-president, and an equivocal assessment by a tenure committee. The Third Circuit held that the plaintiff was not required to prove the existence of a discriminatory motive by the university president himself.

> [I]n spite of Drexel's claim to the contrary, a plaintiff in a discrimination case need not prove intentional discrimination at every stage of the review process. . . . [I]t is . . . uncontroverted that at each stage of the process the evaluator *considered* the reports and recommendations of each previous evaluator. . . . Hence it plainly is possible to conclude that an evaluation at any level, if based on discrimination, *influenced* the decisionmaking process and thus allowed discrimination to infect the ultimate decision.

852 F.2d at 727 (second emphasis added).

Fifth Circuit. In *Laxton v. Gap Inc.*, 333 F.3d 572 (5th Cir. 2003), a decision expressly disapproved in *Hill*, 354 F.3d at 290, the Fifth Circuit upheld a jury verdict on the basis of bias by a lower ranking official. Laxton alleged that she had been fired because she was pregnant, and offered evidence that her immediate supervisor had objected to the pregnancy. The court of appeals upheld the verdict despite the fact that the decision to fire Laxton had been made by two other officials at the company's corporate headquarters. Evidence of discriminatory remarks by that immediate supervisor, the court explained, was sufficient to support such a jury verdict if the remarks

were made "by a person primarily responsible for the adverse employment action *or by a person with influence* or leverage over the formal decisionmaker." 333 F.3d at 572 (emphasis added). The headquarters officials were primarily responsible for the dismissal, but one of them acknowledged that the allegedly biased supervisor "served as her primary source of information" 333 F.3d at 584.

The Fifth Circuit has applied this rule on repeated occasions. *Palasota v. Haggar Clothing Co.*, 342 F.3d 568, 578 (5th Cir. 2003) (age-related remarks can support a finding of discrimination "even if uttered by one other than the formal decision maker, provided that the individual is in a position to influence the decision"); *Russell v. McKinney Hospital Venture*, 235 F.3d 219, 227 (5th Cir. 2000) ("it is appropriate to tag the employer with an employee's age-based animus if the evidence indicates that the [biased] worker possessed leverage, or exerted influence, over the titular decisionmaker"); *Roberson v. Alltel Information Services*, 373 F.3d 647, 653 (5th Cir. 2004) (*quoting Russell*); *Gee v. Principi*, 289 F.3d 342, 345-47 (5th Cir. 2002) (*quoting Russell*); *Rios v. Rossotti*, 252 F.3d 375, 381 (5th Cir. 2001) (*quoting Russell*).

Sixth Circuit. In *Wells v. New Cherokee Corp.*, 58 F.3d 233 (6th Cir. 1995), the Sixth Circuit rejected a proposed jury instruction that embodied the very legal rule adopted by the Fourth Circuit in *Hill*. The proposed instruction read:

> [B]efore you may find that a [biased] statement tends to prove that Cherokee discriminated against Ms. Wells because of her age, you must first find that the person who allegedly made the statement was the same person who made the ultimate decision to discharge Ms. Wells.

58 F.3d at 237. That proffered instruction was improper, the Sixth Circuit reasoned, because the trier of fact was entitled to consider statements made by all individuals "who were meaningfully involved in the decision to terminate an employee." 58 F.3d at 238. In *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 354-55 (6th Cir. 1998), the Sixth Circuit reiterated that a finding of discrimination could be based on

> remarks by those who did not independently have the authority or did not directly exercise their authority to fire the plaintiff, but who nevertheless played a meaningful role in the decision to terminate the plaintiff. . . .

The critical question was whether the individual who made the biased remarks "was in a position to influence the . . . decision" made by the ultimate decisionmaker. 154 F.3d at 355. In *Simpson v. Diversitech*, 945 F.2d 156 (6th Cir. 1991), the trial court found that a lower ranking supervisor had for racial reasons initiated certain disciplinary actions against the plaintiff, but that that supervisor "had no role in the final decision" by higher ranking officials to fire the plaintiff. 945 F.2d at 160. The Sixth Circuit held that on those facts the plaintiff was entitled to judgment as a matter of law, because the biased supervisor had caused the resulting dismissal. "[A]bsent [the supervisor's] race-based motive . . . there would not have been a [dismissal]." 945 F.3d at 160. In *Johnson v. Kroger Co.*, 319 F.3d 858 (6th Cir. 2003), the court of appeals held that the defendant could be held liable if the plaintiff was dismissed because a biased store manager had "the ability to influence" the decision made by a regional manager. 319 F.3d at 868.

In *Gutzwiller v. Fenik*, 860 F.2d 1317 (6th Cir. 1988), a jury found that the plaintiff had been denied tenure at the University of Cincinnati because of the discriminatory actions of the head of her department and by the chairman of her tenure review committee. The evidence of invidious discrimination was limited to the chairman and department head. Their initial negative recommendation had subsequently been considered by the full tenure review committee, and then the dean, provost, president and finally the university's board of trustees. The Sixth Circuit concluded that the biased actions by the chairman and department head were sufficient to support a finding that they had caused the denial of tenure by "influencing the opinions and votes" of the committee and then higher officials. 860 F.2d at 1326, 1333.

Eighth Circuit. In *Kientzy v. McDonnell Douglas Corp.*, 990 F.2d 1051 (8th Cir. 1993), the plaintiff was dismissed by a company's disciplinary committee because she had repeatedly gone home for lunch. An invidiously motivated supervisor had engineered that dismissal through the particular manner in which he chose to respond to what would ordinarily have been treated as a minor infraction. The Eighth Circuit concluded that the employer was liable for the resulting discharge, even though there was no claim that the disciplinary committee itself had acted with any improper motive. Similarly, in *Jiles v. Ingram*, 944 F.2d 409 (8th Cir. 1991), the court of appeals found a city liable for the dismissal of Jiles, even though the mayor and fire chief who fired Jiles had no personal intent to discriminate. Liability was imposed because of the discriminatory actions of the lesser officials who had initiated the discharge proceeding. 944 F.2d at 413.

Ninth Circuit. In the Ninth Circuit, liability may be imposed based on the discriminatory motives of any official involved in the decisionmaking process, even though a different official made the actual decision. In *Bergene v. Salt River Project Agricultural Improvement and Power Dist.*, 272 F.3d 1136 (9th Cir. 2001), a biased *former* supervisor of the plaintiff had affected the decision to deny the plaintiff a promotion by advising the actual decisionmaker to alter the job requirements in a manner unfavorable to Bergene, and by providing that decisionmaker with an unfavorable assessment of Bergene's abilities. The Ninth Circuit held that evidence of a discriminatory motive on the part of that former supervisor would support the imposition of liability on the employer, because there was evidence that the ex-supervisor "played an influential role in the selection process." 272 F.2d at 1141. In *Dominguez-Curry v. Nevada Transp. Dept.*, 424 F.3d 1027 (9th Cir. 2005), the court of appeals reiterated that

> [w]here, as here, the person who exhibited discriminatory animus influenced or participated in the decisionmaking process, a reasonable factfinder could conclude that the animus affected the employment decision.

424 F.3d at 1039-40. And in *Lam v. University of Hawai'i*, 40 F.3d 1551 (9th Cir. 1994), the Ninth Circuit relied on similar holdings in the First, Third and Sixth Circuits when it ruled that

> [a]s other courts have recognized, discrimination at any stage of the academic . . . promotion process may infect the ultimate decision. . . . Accordingly, a plaintiff in a university discrimination case need not prove intentional discrimination at every stage of the decisionmaking process;

> impermissible bias at any point may be sufficient to sustain liability.

40 F.3d at 1560-61.

District of Columbia Circuit. The District of Columbia Circuit also applies the liability rule rejected by the Fourth Circuit. In *Griffin v. Washington Convention Center*, 142 F.3d 1308 (D.C. Cir. 1998), the plaintiff had been dismissed by the defendant's Director of Operations. At trial the magistrate judge excluded testimony that the plaintiff's immediate supervisor had made a series of sexist remarks. The magistrate judge rested the exclusion of that evidence on the very distinction endorsed by the Fourth Circuit in the instant case:

> [T]his witness . . . did not have any authority to hire or fire individuals. He made a recommendation and, on a number of occasions, his recommendation was overruled. So, he was not the one who had the ultimate authority on it.

142 F.3d at 1311. The District of Columbia Circuit reversed.

> [The supervisor] was the [ultimate decisionmaker's] source of information regarding Griffin's job performance, [and] repeatedly urged [the decisionmaker] to terminate Griffin. . . .
>
> [W]e join at least four other circuits in holding that evidence of a subordinate's bias is relevant where the ultimate decision maker is not insulated from the subordinate's influence.

142 F.3d at 1312.

IV. THE QUESTION PRESENTED IS IMPORTANT

The number and variety of cases in which this issue has arisen amply attest to the importance of the Question Presented. At least where a potential dismissal is involved, many if not most employers today utilize a personnel process in which several different officials are involved in initiating the process, providing information, offering recommendations, and making the ultimate decision.

The Fourth Circuit's stringent "actual decisionmaker" requirement, announced in *Hill* and applied in the instant case, effectively legalizes intentional discrimination on the basis of race, national origin, religion, gender or age in all phases of such a decisionmaking process except the very last stage. If one official for a discriminatory reason initiates disciplinary action or proposes denial of tenure, a second provides inaccurate information for an invidious purpose, and a third recommends dismissal because he dislikes employees who are white, non-white, female, over 40, or disabled, the victim of this scheme will have no remedy in the Fourth Circuit so long as yet a fourth official, who makes the ultimate decision, remains blissfully ignorant of the illicit motives of his or her colleagues.

The rule adopted by the Fourth Circuit in *Hill* and applied in this case – limiting liability under Title VII to cases in which the highest level actual decisionmaker acted with discriminatory animus – will effectively immunize from liability many acts of discrimination. As the EEOC correctly observed in its brief in *Hill*, the interpretation of Title VII in *Hill* "would leave much actual discrimination

unabated."[22] The Tenth Circuit in *BCI* warned that the Fourth Circuit rule in *Hill* would seriously obstruct enforcement of Title VII.

> The Fourth Circuit's standard . . . undermines the deterrent effect of subordinate bias claims, allowing employers to escape liability even when a subordinate's discrimination is the sole cause of an adverse employment action, on the theory that the subordinate did not exercise complete control over the decisionmaker.

EEOC v. BCI Coca-Cola Bottling Co., 450 F.3d at 487.[23] In the instant case, the district judge candidly recognized that the application of *Hill* "has the unfortunate potential to create a safe harbor for workplace discrimination by any prejudiced supervisor who can fairly be described as not being the final decisionmaker on personnel decisions." (App. 20a).

The dissenting opinion in *Hill* correctly foresaw that the holding in that case would in many instances legalize intentional discrimination on the basis of race or sex.

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[22] Brief of the U.S. Equal Employment Opportunity Commission as *Amicus Curiae* in Support of Appellant, Hill v. Lockheed Martin Logistics Management, Inc., No. 01-1359 (4th Cir.), p. 13.

[23] *Hill*, 354 F.3d at 299-301 (dissenting opinion):

> A major purpose of Title VII . . . is to outlaw discriminatory employment decisions that are made because of sex. . . . Biased subordinates without decisionmaking authority often influence these decisions. Yet the majority holds that when a biased subordinate with no decisionmaking authority exercises substantial influence over an employment decision, the subordinate's bias cannot be imputed to the formal decisionmaker who acts for the employer. . . . The majority renders Title VII . . . essentially toothless when it comes to protecting employees against unlawful employment decisions that are motivated by biased subordinates.

> The majority is frank in explaining that its holding removes an entire class of discrimination cases from the protection of Title VII. . . . Under the majority's standard, unlawful discrimination will go unaddressed in many cases where a subordinate's discriminatory bias taints the employment decision.

Hill, 354 F.3d at 304 (dissenting opinion). In the instant case, the Fourth Circuit rule in *Hill* has had precisely that effect, a result that would not have occurred in virtually any other circuit in the nation.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the court of appeals. In the alternative, as the Court chose to do in *Hill*, the Solicitor General should be invited to file a brief expressing the views of the United States.

Respectfully submitted,

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United States Court of Appeals
Fourth Circuit

Marianne Sawicki

Plaintiff-Appellant,

v.

Morgan State University; Earl S. Richardson; Clara I. Adams; Burney J. Hollis; Otto Begus; State of Maryland,

Defendants-Appellees.

No. 05-1891

Submitted Jan. 25, 2006
Decided March 1, 2006

Appeal from the United States District Court for the District of Maryland, at Baltimore. William M. Nickerson, Senior District Judge. (CA-03-1600-1-WMN).

Marianne Sawicki, Appellant Pro Se. John Joseph Curran, Jr., Attorney General, Dawna Marie Cobb, Mark Jason Davis, Assistant Attorneys General, David Reid Moore, Office of the Attorney General of Maryland, Baltimore, Maryland, for Appellees.

Before KING and SHEDD, Circuit Judges, and HAMILTON, Senior Circuit Judge

Affirmed by unpublished PER CURIAM opinion.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM

Marianne Sawicki appeals the district court's order granting summary judgment for Morgan State University

and dismissing her claims of employment discrimination. We have reviewed the record and find no reversible error. Accordingly, we affirm on the reasoning of the district court. *See Sawicki v. Morgan State Univ.*, No. CA-03-1600-1-WMN (D.Md. Aug. 2, 2005). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARIANNE SAWICKI	:	
	:	
v.	:	Civil No. WMN-03-1600
	:	
MORGAN STATE UNIVERSITY *et al.*	:	

MEMORANDUM

Before the Court is the motion for summary judgment filed by Defendants Morgan State University, the State of Maryland, Earl Richardson, Clara Adams, Burney Hollis, and Otto Begus. Paper No. 107. Also pending is Defendants' motion to seal the records in this case. Paper No. 115. The motions are fully briefed and ripe for decision. Upon a review of the applicable case law, the Court determines that no hearing is necessary (Local Rule 105.6) and that Defendants' motion for summary judgment will be granted. The motion to seal will be denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Marianne Sawicki was hired under a three-year contract by Defendant Morgan State University (MSU) as an Associate Professor in its Department of Philosophy and Religious Studies in March 2000. Defendant MSU denied her tenure application in June 2002 and her contract expired in June 2003.

In her Second Amended Complaint, Paper No. 35, Plaintiff alleges the following: (1) that Defendants discriminated against her on the basis of her race and gender; (2) that the discrimination caused her tenure denial,

and (3) that the discriminatory conduct constituted sexual harassment. Essentially, Plaintiff argues that Defendant MSU's President, Vice-President of Academic Affairs (VPAA), Dean of the College of Liberal Arts (Dean), and Chair of the Philosophy and Religious Studies Department (Chair) (as well as other colleagues and some MSU students) each worked to undermine her performance and advancement at MSU because she is a white female, at the same time that they provided favorable treatment to MSU's black male instructors (and students). Following the close of discovery, Defendants have moved for summary judgment on each of Plaintiff's remaining claims, all of which are brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, and 42 U.S.C. § 1983.

Review of the undisputed facts, construed with all reasonable inferences drawn in Plaintiff's favor, shows that Plaintiff began teaching for Defendant MSU in the Fall of 2000 as an associate professor. She arrived at the university as an experienced teacher and accomplished scholar. During her first year at MSU, however, Plaintiff encountered substantial problems with many of her students. The problems arose from Plaintiff's enforcement of classroom codes of conduct, often related to restricting the presence of food and drink in the classroom and enforcing prompt attendance policies.

Relations with some of her students deteriorated to the point where a "major confrontation" lasting 25 minutes occurred in class on February 28, 2001. Defs.' Ex. 9, Plaintiff's contemporaneous typed notes. One student, who had been ordered to remove her cup of soda, concluded her ensuing argument with Plaintiff by exclaiming "You're crazy. Bitch!" as she left the classroom. *Id.*

"[S]everal students applauded" the insult prompting Plaintiff to admonish the entire class for "totally unacceptable" behavior and to order the entire class "to be silent for three minutes." *Id.* Several students refused to sit silently and immediately complained that Plaintiff's treatment of her adult students throughout the semester was provocatively disrespectful. *See id.* Plaintiff noted immediately after the incident that "a number of the students have inappropriate needs which I cannot possibly fill. They are not ready to allow me to do my job." *Id.* She added that an honest examination of her own conscience did "not find any disrespect for them." *Id.*

Plaintiff then instituted formal disciplinary proceedings against five of her students with the University's Office of Student Judicial Affairs.[1] Defs.' Ex. 5. Plaintiff

[1] Each of the five assiduously detailed charge letters began "[i]t has become necessary for me to refer a student to the Student Judicial Program Office for disciplinary action" and concluded "I reluctantly request that you review [the alleged behavior] and impose appropriate sanctions." Defs.' Ex. 5. Plaintiff specifically notes, *inter alia*, the following classroom misconduct: one student ridiculed her for being "crazy," "insane," and "deluded" and was "aggressively chewing gum and popping it in [her] face" while she reprimanded him privately during class; a second student "called me a 'crazy woman' and 'bitch;' " a third student characterized Plaintiff's personality as "anal" and then "maybe not anal, but compulsive" adding that his parents believed that Plaintiff "must be insane" and that he dreads coming to class because he considers it "unbearably unpleasant;" a fourth student, allegedly still simmering over being locked out of the classroom while using the bathroom three weeks earlier, essentially stated "that [Plaintiff] exhibit[s] mental illness, 'mood swings,' and Pre Menstrual Syndrome"; and a fifth student, who had told the class three weeks earlier that "she had decided to cease speaking with [Plaintiff]," stated that Plaintiff has "mood swings and a split personality" and exhibit[s] Pre Menstrual Syndrome." *Id.* The offending students were male and female, white and black.

was also the subject of a petition drive by 14 of her students from that same class formally requesting an investigation of Plaintiff by the Chair for perpetuating "an inhospitable academic environment." Defs.' Ex. 10. One 40 year-old student, Vincent Downs, Jr., wrote to Dean Hollis detailing what he considered to be Plaintiff's pattern of "provoking students in order to make it appear as if the student is a problem" and stating his firm belief that her behavior "stems from her inability to receive any information that is contrary to her opinions and beliefs." Defs.' Ex. 11. He concluded that he could "no longer allow [him]self to be subjected to this ***unfair, degrading***, and ***harassing*** treatment of this faculty member" and would likely be pressing charges against her. *Id.* (emphasis in original). Ultimately, despite the student petition and complaints, the Dean supported Plaintiff on the grounds that she was free to enforce her stated class rules as she saw fit, as long as she did not violate students' rights. Defs.' Ex. 74 at 130.

The record also shows no factual dispute that Plaintiff also had strained relations with some important colleagues in her small department. Specifically, within her first three semesters at MSU she had several arguments with her Chair, Otto Begus, a white male who in 2000 had enthusiastically requested that Plaintiff be hired as a full professor. Defs.' Ex. 67. Her department colleague Joanna Crosby, a white female tenured in 2003, stated that Plaintiff "was the most difficult colleague I have ever had," noting that Plaintiff was unreceptive to her advice on effective class management, generally unpleasant and difficult in department meetings, and had even accused her of being "unethical" in her choice of a logic textbook. *Id.* After receiving complaints about Plaintiff's teaching from several of her own former students, Crosby stated

that she observed three of Plaintiff's classes and subsequently reported Plaintiff's "pedantic teaching style" and "condescending tone towards students" to their Chair. *Id.* Her department colleague Janice McLane, a white female tenured in 1999 and who briefly served as Plaintiff's acting Chair, stated that Plaintiff was "the most troublesome faculty member I have ever had to deal with in 20 years of employment in higher education." Defs.' Ex. 69. In addition to recounting several conflicts she had with Plaintiff, McLane noted that Plaintiff generated an inordinate number of student complaints many of which were "highly critical."[2] *Id.*

Plaintiff's evaluations at every stage of the tenure review process reflected concerns about her teaching and her fractured relationships with many of her students as well as her problems relating to her colleagues. In October 2001, the department's tenure review committee (DRC) unanimously recommended that Plaintiff be denied tenure and promotion; Plaintiff's Chair made the same recommendation. In November 2001, the school-wide review committee (SRC) made the same unanimous recommendation. In January 2002, however, the Dean did not adopt the consistent recommendations of the Chair and two unanimous committees. Defs.' Ex. 18. Instead, he recommended deferral, noting that the record on her teaching was mixed with some students rating her very highly while others were so negative as to file complaints and

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[2] The Court recognizes that Plaintiff may dispute the substance of Crosby and McLane's statements. The Court includes them in its statement of undisputed facts, however, merely to illustrate the fact that Plaintiff did not get along well with some of her department colleagues or Chair, even when those colleagues shared some or all of her protected traits.

petitions against her.[3] *Id.* His recommendation highlighted that there was great uncertainty regarding her teaching and that tenure and promotion "require much more certainty than is present here." *Id.* In rating her service component favorably, the Dean addressed her activities in the wider community without mentioning her collegiality problems. *Id.* The Vice-President for Academic Affairs (VPAA) conducted her review of the dossier and, on June 28, 2002, recommended a one-year deferral on the decision. Defs.' Ex. 20. In her letter to Plaintiff, the VPAA asked her to address the area of "substantial professional achievement" as defined in MSU's tenure policies and asked her to meet with the Dean to discuss ways to strengthen her application. *Id.*

That same day, the President notified Plaintiff by letter of his decision to offer deferral and expressly wrote that if Plaintiff "agree[d] with the terms of this deferral," she needed to return her signed agreement "within 10 calendar days from the date of this letter." Defs.' Ex. 21. The letter stated that failure to meet the terms of the deferral would result in termination without further notice on June 30, 2003. *Id.* Plaintiff did not sign and return the deferral within that time period.

Instead, Plaintiff appealed the decision to defer her tenure application. Plaintiff asserts that she believed her appeal of the adverse tenure decision also constituted acceptance of the offer to re-apply for tenure in the coming year, and for summary judgment purposes the Court will

[3] The Dean's letter specifically included seven unequivocally positive quotes about Plaintiff's teaching drawn from student evaluations, but only addressed the complaints between Plaintiff and her students in general terms.

assume that was her sincere belief. Regardless of Plaintiff's beliefs as to what she was doing, however, the facts in the record and law of the case show that she did not accept the deferral offer, and by mid-July 2002 her appeal was limited to the adverse tenure decision. Unless her appeal succeeded, Plaintiff would be terminated on June 30, 2003. *See* March 15, 2004, Mem. at 21 (rejecting retaliation claim rooted in Fall 2002 complaints and stating "decision to terminate [Plaintiff] was effectively made" in July 2002 when Plaintiff failed to accept the deferral offer within ten days).

Plaintiff's appeal was unsuccessful. Her appeal was heard by the VPAA on October 8, 2002, and denied by the VPAA in an October 15, 2002, letter advising Plaintiff of her right to appeal to the President. Claiming procedural error, Plaintiff appealed to the President by letter dated October 23, 2002, stating her incorrect assumption that she had been granted a one-year deferral and fourth year on her contract and proposing "immediate tenure and promotion" as "the only possible remedy for the University's muddling" of the process. Defs.' Ex. 24. The President convened a Faculty Appeals Committee to hear the appeal, and it determined that there was no procedural error or violation of the tenure process policies. The President then notified Plaintiff on December 10, 2002, that her appeal was denied and that her employment would terminate on June 30, 2003.

Other facts regarding the composition of Plaintiff's department and the relevant actors are not disputed. First, in 2001, the seven-person department consisted of five white and two African members, and its male to female gender ratio was 4:3. Only Plaintiff's Chair and Janice McLane, both white, were already tenured in 2001

(McLane in 1999). The only other white woman in the department was tenured in 2003. Plaintiff's Chair is white, the VPAA is female, and Plaintiff's position was subsequently filled by a white male. The President, VPAA, Dean, and Chair who all agreed that Plaintiff should not have been tenured in 2002 are the same individuals who all agreed that she should have been hired in 2000.

Plaintiff claims her career advancement was done in by the "racial politics" played by Defendants as well as their anti-female bias. She claims evidence of unlawful discrimination from the student body up the chain of command through the President's office. Specifically she alleges that her Chair set her up for failure by giving her an onerous teaching schedule with difficult students, ordering her to practice strict classroom management and then criticizing her when that failed,[4] commandeering the tenure review process to ensure her defeat, favoring her black male colleague, and "bullying and intimidating" her. She alleges that the DRC was composed of members either hostile to her as a white woman or unwilling to cross her Chair (who also chaired Plaintiff's DRC) and his allies. She alleges that the Dean only

[4] The Court does not see how any reasonable juror could accept this theory. Plaintiff had extensive experience as a college and high school lecturer and had necessarily spent countless hours independently managing her classrooms before even stepping foot on MSU's campus. After encountering problems, Plaintiff sought her Chair's advice on how to run her classroom. Pl.'s Opp. at 7. For her to now allege (1) that she was forced by her Chair to run her class in an adversarial manner designed to cause student insurrection that would reflect poorly on her and (2) that she was compelled, against her better judgment, by an administrator in the Office of Student Affairs to file formal disciplinary charges against five of her students does not withstand reasoned analysis.

sought negative information about her when investigating the Spring 2001 class insurrection,[5] failed to filter the Chair's lies about Plaintiff when reviewing her tenure application and passed false statements on to the VPAA. She alleges that the VPAA failed to conduct an independent review that would have detected inconsistencies indicating unlawful discrimination and delayed notifying her of her adverse tenure decision. Finally, she alleges that the President failed to administer the university's EEO program, failed to hire her as a full professor, failed to conduct an independent review that would have detected inconsistencies indicating unlawful discrimination, and falsely told her that she lacked appeal rights. Plaintiff maintains that taken together these circumstances create a reasonable inference that Defendants unlawfully discriminated against her.

II. LEGAL STANDARD

Summary judgment is proper if the evidence before the court, consisting of the pleadings, depositions, answers to interrogatories, and admissions of record, establishes that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A party seeking summary judgment bears the initial responsibility of informing the court of the basis of its motion and identifying the portions of the opposing party's case which it believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477

[5] This allegation is tenuous at best considering that the Dean sided with Plaintiff against the disgruntled students.

U.S. at 323. The non-moving party is entitled to have "all reasonable inferences . . . drawn in its respective favor." *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1129 (4th Cir. 1987).

If the movant demonstrates that there is no genuine issue of material fact and that the movant is entitled to summary judgment as a matter of law, the non-moving party must, in order to withstand the motion for summary judgment, produce sufficient evidence in the form of depositions, affidavits, or other documentation which demonstrates that a triable issue of fact exists for trial. *Celotex*, 477 U.S. at 324. Unsupported speculation is insufficient to defeat a motion for summary judgment. *Felty*, 818 F.2d at 1128 (citing *Ash v. United Parcel Serv., Inc.*, 800 F.2d 409, 411-12 (4th Cir. 1986)). Furthermore, the mere existence of some factual dispute is insufficient to defeat a motion for summary judgment; there must be a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Thus, only disputes over those facts that might affect the outcome of the case under the governing law are considered to be "material." *Id.*

In the context of employment discrimination pretext cases, "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated" but will not necessarily do so. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148 (2000). The Supreme Court adds, "[c]ertainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory." Construing *Reeves*, the Fourth

Circuit directs that "[e]ven when a plaintiff demonstrates a prima facie case and pretext, his claim should not be submitted to a jury if there is evidence that precludes a finding of discrimination. . . ." *Rowe v. Marley Co.*, 233 F.3d 825, 830 (4th Cir. 2000).

III. DISCUSSION

A. Employment discrimination law after *Desert Palace*

Congress, through Title VII, has made it unlawful for an employer to "discharge any individual" or "to limit . . . employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect [her] status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a) (West Supp. 2004). By amendment in 1991, Congress clarified that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." *Id.* § 2000e-2(m). Congress also provides a limited affirmative defense for an employer who violates § 2000e-2(m) where it "demonstrates that it would have taken the same action in the absence of the impermissible motivating factor." *Id.* § 2000e-5(2)(B).

The Supreme Court, interpreting Title VII, has constructed two analytical frameworks, pretext and mixed motive, by which the federal courts may evaluate discrimination cases. *Compare McDonnell Douglas v. Green*,

411 U.S. 792 (1973) (introducing pretext framework[6]) *with Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (introducing mixed motive framework). The Fourth Circuit stresses that "[r]egardless of the type of evidence offered by a plaintiff as support for her discrimination claim (direct, circumstantial, or evidence of pretext), or whether she proceeds under a mixed-motive or single-motive theory, '[t]he ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination.'" *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 286 (4th Cir. 2004) (en banc) *cert. dismissed*, 125 S. Ct. 1115 (2005) (quoting *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 153 (2000)).

The Supreme Court's unanimous 2003 decision in *Desert Palace, Inc. v. Costa*, however, radically altered the contours of the mixed motive framework and has created some confusion regarding the continued viability of the *McDonnell Douglas* pretext framework. 539 U.S. 90 (2003). Before *Desert Palace*, courts considered direct evidence of unlawful discrimination a prerequisite to proper use of the mixed motive framework. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 276 (1989) (O'Connor, J., concurring) *and* progeny, *e.g.*, *Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir. 1995) (requiring direct evidence pursuant to Justice O'Connor's *Price Waterhouse* concurrence). In the absence of direct evidence, plaintiffs with only circumstantial evidence were relegated to proceeding under *McDonnell*

[6] The pretext framework is also commonly referred to as the *McDonnell Douglas* or single motive framework. As used in this opinion, the three terms (or any hybrid of them, *e.g.*, *McDonnell Douglas* pretext framework) are functionally synonymous.

Douglas's pretext framework.[7] *Desert Palace*, however, makes clear that no such heightened evidentiary requirement exists under the 1991 amendments to Title VII. 539 U.S. 90, 101-02 (2003) (construing 42 U.S.C. § 2000e-2(m) and abrogating *Fuller*); *see also Hill v. Lockheed Martin* (explaining changes to proper application of mixed motive framework from *Price Waterhouse* through *Desert Palace* and stating, at 284-85, that mixed motive plaintiff need only present sufficient evidence that illegal discrimination motivated adverse employment action).

With no substantive distinction between the evidentiary burdens required for application of the mixed motive or pretext frameworks, federal district courts have come to different conclusions regarding whether these two frameworks remain separately viable in the wake of *Desert Palace*. Soon after *Desert Palace* was issued, one district

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[7] In its simplest form the three-step pretext framework requires the plaintiff to make out a prima facie case of discrimination after which the burden shifts to the defendant to put forth a nondiscriminatory reason for the adverse action. *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). From there, to prevail the plaintiff must show that the defendant's reason was merely a pretext and that discrimination was the real reason for the adverse action. *Id.* The Supreme Court further refined the proper application of the pretext framework, most notably in *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981) (holding that Title VII defendant bears only the burden of explaining clearly the nondiscriminatory reasons for its action when the plaintiff has proved a prima facie case of employment discrimination); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993) (holding trier of fact's rejection of employer's asserted legitimate, nondiscriminatory reasons for its challenged actions does not entitle employee to judgment as a matter of law under *McDonnell Douglas*); and *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) (holding prima facie case and evidence of pretext may permit trier of fact to find unlawful discrimination, without additional, independent evidence of discrimination).

court flatly stated that the decision exposes the dichotomy between mixed and single motive cases as simply "a false one." *Dare v. Wal-Mart*, 267 F. Supp. 2d 987, 991-92 (D. Minn. 2003) (condemning the "legal fiction" of a *McDonnell Douglas* single motive case as a "machination[] of jurisprudence that do[es] not comport with common sense and basic understandings of human interaction" because "few employment decisions are made solely on the basis of one rationale to the exclusion of all others").[8] Many other courts, moved by *Dare's* analysis but unwilling to jettison *McDonnell Douglas* altogether, adopted a merged or modified *McDonnell Douglas* framework test, best articulated by *Dunbar v. Pepsi-Cola General Bottlers of Iowa, Inc.* 285 F. Supp. 2d 1180, 1194 (N.D. Iowa 2003),[9] *abrogated by Griffith v. City of Des Moines*, 387 F.3d 733 (8th Cir. 2004) (stating, at 736, "we conclude that *Desert Palace*

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[8] *See also* T.L. Nagy, *The Fall of the False Dichotomy: The Effect of Desert Palace v. Costa on Summary Judgment in Title VII Discrimination Cases*, 46 S. Tex. L. Rev. 137, 151-52 (2005) (noting that 12 of the first 13 district court judges issuing opinions on the issue "conclude that [*Desert Palace*] significantly modifies the traditional [*McDonnell Douglas*] paradigm").

[9] The *Dunbar* court concluded that to fully accommodate *Desert Palace*, only the third step of the *McDonnell Douglas* framework required modification and that once a prima facie case is made and the defendant has proferred a legitimate reason "to prevail . . . the plaintiff must prove by the preponderance of the evidence either (1) that the defendant's reason is not true, but is instead a pretext for discrimination (pretext alternative), *see Reeves*, [citation omitted]; or (2) that the defendant's reason, while true, is only *one* of the reasons for its conduct, and another 'motivating factor' is the plaintiff's protected characteristic (mixed-motive alternative)." *Id.* at 1197-1198 (emphasis in original). The first two district court decisions directly on point and within this circuit, both issued by Judge Beaty in the Middle District of North Carolina, adhered to the reasoning in *Dunbar*. *Rishel v. Nationwide Mutual Ins. Co.*, 297 F. Supp. 2d 854, 862-866 (M.D.N.C. 2003); *Jones v. Southcorr, LLC*, 324 F. Supp. 2d 765, 775-77 (M.D.N.C. 2004).

had *no* impact on prior Eighth Circuit summary judgment decisions") (emphasis in original). Along with the Eighth Circuit in *Griffith*, other federal appeals courts soon issued rulings that the *McDonnell Douglas* framework remained viable. *See, e.g.*, *Cooper v. Southern Co.*, 390 F.3d 695, 725 n.17 (11th Cir. 2004) (stating "the *Desert Palace* holding was expressly limited to the context of mixed-motive discrimination cases"). The *Desert Palace* decision itself is simply cryptic regarding its impact on single motive cases, merely stating by footnote that "[t]his case does not require us to decide when, if ever, [42 U.S.C. § 2000e-2(m)] applies outside of the mixed-motive context." 539 U.S. at 94 n.1. In short, there remain many unanswered questions, and courts throughout the nation have been struggling to navigate the morass of competing rationales and instructions when seeking to properly adjudicate employment discrimination claims.

On July 25, 2005, the Fourth Circuit shed some much-needed light on the subject when it expressly recognized the continued vitality of the *McDonnell Douglas* framework in pretext cases, noting (1) that the *Desert Palace* decision did not even mention *McDonnell Douglas*, (2) that "the Supreme Court has continued to invoke the burden-shifting framework in pretext cases," and (3) that other circuits "have also rejected the view that *Desert Palace* nullified the *McDonnell Douglas* framework."[10] *Diamond v.*

[10] One of the three sister circuit decisions cited favorably by the Fourth Circuit in *Diamond* rejects the conclusion that *McDonnell Douglas* has been nullified but nonetheless adopts *Dunbar's* modified *McDonnell Douglas* framework for cases where plaintiff proceeds under both mixed motive and pretext theories. *Keelan v. Majesco Software, Inc.*, 407 F.3d 332, 341 (5th Cir. 2005) ("This Circuit has adopted use of

(Continued on following page)

Colonial Life & Accident Ins., Co., ___F.3d___, 2005 WL 1713188 *6 n.5 (4th Cir. July 25, 2005) (published opinion). At the same time, however, the court also noted that where a plaintiff "simply prefers to proceed without the benefit of the burden-shifting framework, she is under no obligation to make out a prima facie case." *Id.* n.4.

Therefore, this Court will continue to use the tools provided by the traditional *McDonnell Douglas* framework in assessing any employment discrimination claim that is not solely a mixed motive case and must do so where the case is solely based on pretext.[11] It will not, however, automatically grant a defendant's motion for summary judgment where a plaintiff falls short in meeting one element of her *McDonnell Douglas* prima facie case, if that case can also be reasonably construed as a mixed motive case. While struggling to meet the low threshold of the prima facie case is typically indicative of a case's overall infirmity, when evaluating cases that can fairly be described as alleging both pretext and mixed motive (or mixed motive alone), this Court will focus on whether a reasonable juror could conclude that illegal discrimination was a motivating factor in the employment decision.

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a 'modified *McDonnell Douglas* approach' in cases where the mixed-motive analysis may apply.").

[11] The Court understands *Diamond* to direct that *McDonnell Douglas* controls, unequivocally and without modification, those cases that are fairly characterized as being only pretext (and not mixed motive) cases.

B. Employment discrimination law after *Hill v. Lockheed Martin* and the "actual decision-maker" test

Where a plaintiff seeks to attribute her supervisor's discriminatory conduct to her employer, the Fourth Circuit now applies a particularly rigorous standard. *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277 (4th Cir. 2004) (en banc), *cert. dismissed*, 125 S. Ct. 1115 (2005). In *Hill*, the plaintiff had put forth substantial direct and circumstantial evidence that her safety inspector, who reported her for violations that ultimately caused her dismissal, held discriminatory animus towards her based on her age and gender. The majority found that even with all reasonable inferences taken in Hill's favor, the facts demonstrated that she had committed the reported infractions warranting the termination ordered by the non-discriminating agents of her employer and granted summary judgment to the defendant.[12]

The Fourth Circuit, however, did not grant the defendant's summary judgment motion merely on the grounds that the facts demonstrated that discriminatory animus was irrelevant or played no role in the employer's decision to terminate her. Instead, it focused on the discriminating safety inspector's lack of control over final personnel decisions and introduced the following test: to survive

[12] In dissent, Judge Michael, joined by Judges Motz, King, and Gregory, wrote that there was a clear factual dispute as to whether plaintiff Hill had committed one of the infractions or simply been set up by her discriminating safety inspector. *Id.* at 300 (Michael, J., dissenting). The dissent also states that Hill's third reprimand, which quickly led to her discharge, was the product of a flurry of dubious discrepancy reports written by her safety inspector in the days after Hill complained about him.

summary judgment, a Title VII plaintiff "must come forward with sufficient evidence that the [allegedly discriminating] subordinate employee possessed such authority as to be viewed as the one principally responsible for the decision or the actual decisionmaker for the employer." *Id.* at 291. In so holding, the court stressed that discriminating employees who are subordinate to the actual decisionmaker are not 'principally responsible' for the decision "simply because they have influence or *even substantial influence* in effecting a challenged decision." *Id.* (emphasis added).

This standard, which this Court is clearly obligated to follow, presents a substantial obstacle to the Title VII plaintiff who, as here, alleges that she was terminated because of the discriminatory conduct of her immediate supervisors but struggles to show that the ultimate decisionmaker harbored that same animus. The rule has the unfortunate potential to create a safe harbor for workplace discrimination by any prejudiced supervisor who can fairly be described as not being the final decisionmaker on personnel decisions.[13] Properly applying *Hill's* actual decisionmaker test to Defendant MSU's multi-tiered tenure application process shelters the alleged discriminatory acts of Plaintiff's immediate supervisors from this Court's analysis unless these discriminatory acts can be fairly attributed to the actual decisionmakers.

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[13] *See, e.g., Lust v. Sealy, Inc.*, 383 F.3d 580, 584 (7th Cir. 2004) (declining to adopt *Hill's* holding that "subordinate's influence, even substantial influence, over the supervisor's decision is not enough to impute the discriminatory motives of the subordinate to the supervisor").

Defendant MSU's tenure application process has several stages of review. It begins when the candidate submits her application and dossier to her department's Chair. The DRC then reviews the application materials and furnishes its recommendation back to the Chair. The Chair submits the dossier along with both his own and the DRC's recommendations to the Dean. The SRC then evaluates the application and furnishes its recommendation back to the Dean. From there, the Dean submits the dossier along with his own and all other accumulated recommendations to the VPAA. She then makes her own recommendation and forwards all the materials to the President who ultimately issues the decision on tenure.

Applying *Hill* to these facts, it is clear that only the President and VPAA can be considered the actual decisionmakers. Plaintiff's Chair recommended that Plaintiff be denied tenure outright but his recommendation was not followed; Plaintiff was offered a deferral. The Dean's recommendation that Plaintiff be deferred for one year was honored by the VPAA and President but there is no factual dispute that 8 of the Dean's 26 tenure recommendations (made in the five-year period beginning in 1999-2000) have not been followed. Defs.' Ex. 65 ¶6. Under *Hill*, neither the Chair[14] nor Dean can reasonably be considered actual decisionmakers. The Court presumes that the President is an actual decisionmaker and also considers the VPAA to be one because the record shows that her

[14] The record also reflects that the Chair had originally recommended that Plaintiff be hired as a full professor but that she was hired as an associate. Whether speaking for or against Plaintiff, the Chair in this case clearly lacks actual decisionmaking authority over Plaintiff's employment.

recommendations on tenure and promotion were followed by the President in all but one instance in the five-year period starting in 1999-2000. Defs.' Ex. 65.

Plaintiff claims that Defendants discriminated against her because of her race and gender. As explained in Section III-A, *supra*, where an employment discrimination claim can be fairly construed as alleging both pretext and mixed motive, as in this case,[15] the Court will analyze Plaintiff's claims under both frameworks. If Plaintiff is unable to sustain her allegations under either framework, Defendants are entitled to summary judgment.

C. Race and gender discrimination in the denial of tenure

1. Pretext

To establish a pretext claim for unlawful discrimination in a failure to promote/tenure case, Plaintiff must first make out a prima facie case of discrimination showing the following: (1) that she is a member of a protected group; (2) that she suffered some adverse employment action; (3) that at the time of the adverse employment action, she was performing at a level that met her employer's legitimate expectations; and (4) that the adverse employment action occurred under circumstances that

[15] Plaintiff's opposition makes clear that she considers this action to be brought under both theories. *See* Pl.'s Opp. at 31 (discussing standards for pretext and mixed motive frameworks). More important, common sense dictates that most employment discrimination cases after *Desert Palace* will properly be treated as mixed motive cases. *See, e.g., Dare v. Wal-Mart*, 267 F. Supp. 2d 987, 991-92 (D. Minn. 2003) (stating the unassailable proposition that "few employment decisions are made solely on basis of one rationale to the exclusion of all others").

raise an inference of unlawful discrimination. *Larebo v. Clemson Univ.*, 175 F.3d 1014, 1999 WL 152863, *3 (4th Cir. 1999) (unpublished decision) (applying pretext framework to denial of tenure) (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993)). From there, under the familiar *McDonnell Douglas* burden-shifting paradigm, Defendants must then merely produce a non-discriminatory reason for their action. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). At that point, "the *McDonnell Douglas* framework – with its presumptions and burdens – disappear[s] and the sole remaining issue [is] discrimination *vel non*." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142-143 (2000) (internal citations and quotations omitted).

Because all plaintiffs necessarily have a race and gender and the tenure denial is undisputed here, Plaintiff quickly satisfies the first two elements of her prima facie case. She has also put sufficient evidence into the record from which a reasonable juror could conclude that she was meeting her employer's legitimate expectations as an associate professor. Because Defendants also quickly meet the second step burden of producing a non-discriminatory reason for the denial, the Court's inquiry necessarily focuses on the fourth element of the prima facie case, whether the circumstances surrounding her tenure denial raise a reasonable inference of unlawful discrimination, and if so, whether a reasonable juror could ultimately conclude that unlawful discrimination played a role in the tenure denial.

The Fourth Circuit has repeatedly stated its reluctance to second-guess the inherently subjective tenure decisions of academic institutions. *Jiminez v. Mary Washington College*, 57 F.3d 369, 377 (4th Cir. 1995) ("The

federal courts have adhered consistently to the principle that they operate with reticence and restraint regarding tenure-type decisions."); *Larebo v. Clemson Univ.*, 175 F.3d 1014, 1999 WL 152863 *4 (4th Cir. Mar. 22, 1999) (unpublished decision) (affirming summary judgment in denial of tenure case) ("When considering whether a decision to deny tenure was based on an unlawful reason, the plaintiff's evidence of pretext 'must be of such strength and quality as to permit a reasonable finding that the denial of tenure was obviously or manifestly unsupported.'"); *Fabunmi v. Univ. of Md. at College Park*, 172 F.3d 862, 1999 WL 89277 *1 (4th Cir. Feb. 23, 1999) (unpublished decision) (internal citation omitted) ("Absent credible evidence of unlawful discrimination, federal courts are obliged to refrain from questioning the wisdom of academic tenure decisions.").

Heeding both the Fourth Circuit's direction on judicial review of tenure decisions and the recent en banc holding in *Hill*, this Court concludes that no reasonable juror could find that the circumstances surrounding Plaintiff's tenure denial amount to unlawful discrimination or otherwise conclude that unlawful discrimination played a role in the tenure denial. While Plaintiff alleges innumerable indicia of discrimination, the Court will address only those necessary to resolve the case.

Under *Hill's* actual decisionmaker test, the alleged discriminatory behavior of the Chair and Dean is immaterial if it cannot be imputed to the actual decisionmakers, here the President and VPAA. While Plaintiff's complaint and opposition are brimming with allegations of discriminatory behavior by her immediate supervisors, there is little in the record to suggest that either decisionmaker should have been on notice of either supervisor's allegedly

disparate treatment of Plaintiff (or any underlying discriminatory animus towards whites or women) at the time they made the decision to defer her tenure application. Plaintiff must provide a factual basis from which a reasonable juror could conclude that the President and VPAA were motivated by unlawful discrimination when they made their tenure decision.[16]

Plaintiff points to three black male colleagues' experiences at MSU as evidence of disparate treatment. Most pertinent to the Court's analysis is the experience of Tsenay Serequeberhan, a black male who also joined the same department as Plaintiff in 2000 and applied for tenure in 2002 along with Plaintiff. While Plaintiff vigorously asserts that Serequeberhan received an easier teaching load and other favorable treatment from the Chair despite Plaintiff's superior performance, which she alleges was recognized by her peer and student evaluations, it is undisputed that both Plaintiff and Serequeberhan were deferred by the actual decisionmakers in 2002, rebutting Plaintiff's case of disparate treatment in the tenure decision. Serequeberhan, unlike Plaintiff, accepted Defendant MSU's deferral offer and successfully re-applied for tenure the next year.

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[16] While the Court has expressed its concern over the potential that *Hill* may create a safe harbor for unlawful employment discrimination, it does not believe that *Hill's* holding amounts to a free pass for non-decisionmakers to discriminate against their subordinate employees or for actual decisionmakers to duck liability by shunning evidence of the unlawful actions of their lower level managers. Where the decisionmakers reasonably should have recognized that unlawful discrimination was tainting a manager's report or recommendation, they certainly can be liable for failing to address the problem.

The Court cannot draw a reasonable inference of discrimination from Serequeberhan's ultimate success in gaining tenure because Defendant has clearly demonstrated through comprehensive personnel records that in the five-year period beginning in 1999-2000, applicants for tenure and/or promotion at MSU fared comparably across racial and gender lines.[17] *See* Def.'s Ex. 65. Within the much narrower realm of Plaintiff's own department, the only other white woman seeking tenure was granted tenure in 2003. *Id.* Likewise, the Court finds no support in the record for Plaintiff's conclusory assertion that she and Serequeberhan were in direct competition for the department's one tenure slot. In fact, the record shows that two members of the department, Serequeberhan and Crosby, were simultaneously awarded tenure the next year.

Plaintiff's allegations against the President do not raise a reasonable inference of unlawful discrimination by him and on the record before the Court would not allow a jury to ultimately conclude that unlawful discrimination played a role in his decision to deny tenure. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). As stated

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[17] In the face of this comprehensive statistical data, which Plaintiff does not dispute, Plaintiff's allegations of favorable treatment of Frank Brown and Robert Birt do not raise an inference of unlawful discrimination. Brown is a poor comparison because he was a member of a different department (English) and never achieved tenure. The fact that his unique ability to teach a journalism class helped him secure a contract as a lecturer does not create a reasonable inference that Plaintiff was unlawfully discriminated against on the basis of either race or gender when she was denied tenure. Likewise, the same inference is not raised by Birt's appointment as a lecturer after MSU also denied his tenure application because he had a long relationship with the university (more than a decade in the department and an MSU alum) and had demonstrated collegiality.

earlier, Plaintiff attempts to impute liability to the President on the grounds that he falsely told her that she lacked appeal rights, failed to conduct an independent review that would have detected inconsistencies indicating unlawful discrimination, failed to administer the university's EEO program, and failed to hire her as a full professor.

First, the President's September 18, 2002, letter to Plaintiff was substantially devoted to resolving Plaintiff's continuing misconception that she had accepted the June 28, 2002, offer of deferral. Defs.' Ex. 22. In its final substantive paragraph, however, the letter stated the President's belief (based upon Plaintiff's letter of August 26, 2002) that Plaintiff's appeal to the VPAA was filed on July 19, 2002, beyond the deadline for appeal, which if true would have ended the appeal process. *Id.* In fact, while Plaintiff did send the untimely July 19th letter to the VPAA, she had also sent the VPAA four other letters, of which the first two were timely, contesting the deferral. Just three days after the President's letter, on September 23, 2002, the VPAA sent Plaintiff a letter addressing her stream of appeal letters and notifying her that the two timely letters and their accompanying materials would be considered at her upcoming appeal hearing. Defs.' Ex. 32. The VPAA also stated that she had read the President's letter from three days before. *Id.* The VPAA concluded with a request that Plaintiff contact her office to schedule an appeal hearing. Considering these facts, it would not be a fair reading of the President's letter to conclude that Plaintiff "was fired before her appeal to [the VPAA] had

even been heard."[18] Pl.'s Opp. at 23. Rather, Plaintiff's contract was set to end in June 2003, unless she successfully appealed the deferral decision.[19]

Review of the President's deposition also reveals that he relies heavily on the advice and analysis of the VPAA in hiring and tenure decisions. His alleged failure to conduct an extensive individualized review of each tenure candidates' applications merely leads to the conclusion that he cannot be considered the sole decisionmaker under *Hill*; it does not, however, raise an inference of unlawful discrimination. Likewise, the President's unfamiliarity with the detailed workings of his Equal Employment Office does not reasonably lead to the conclusion that the office is merely a sham that fails to assist members of the community who consider themselves victims of discrimination. Finally, the decision to hire Plaintiff as an associate and not a full professor does not raise an inference of discrimination merely because the Chair had suggested that she be hired as a full professor. In short, there are no facts

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[18] The Court notes further that Plaintiff is patently overreaching and misstating the record where she asserts "MSU's President also admitted that he falsely accused [Plaintiff] of backdating [a letter. . . .] Ex. 7 at 215-21." Pl.'s Opp. at 24. The attack is rooted only in the President's deposition testimony regarding a discrepancy in letter dates, where he states, "I do not know whether the letter that [Plaintiff] sent to us was backdated to be the 17th. I have no idea." Pl.'s Ex. 7 at 216. This assertion that the President falsely accused Plaintiff of backdating a letter goes beyond the general lack of civility and aggressive lawyering that has typified the behavior of Plaintiff's counsel in this case.

[19] The Court finds no support in the record for Plaintiff's bald assertions that the deferral offer "would vary the terms of her original contract by forcing her to give up the right to pursue the tenure appeal she had just filed" or that Plaintiff held a "right to a fourth year in her contract." Pl.s' Opp. at 22.

from which one can reasonably conclude that the President was motivated by unlawful discrimination in his decision to defer Plaintiff's tenure and deny her appeal of that decision. *See Larebo v. Clemson Univ.*, 175 F.3d 1014, 1999 WL 152863 *4 (4th Cir. Mar. 22, 1999) (unpublished decision) ("When considering whether a decision to deny tenure was based on an unlawful reason, the plaintiff's evidence of pretext 'must be of such strength and quality as to permit a reasonable finding that the denial of tenure was obviously or manifestly unsupported.'").

Because the President relies heavily on the VPAA for almost all of his tenure decisions, it is especially important under *Hill* to determine if her actions and omissions raise a reasonable inference of discrimination by Defendants. The sum of Plaintiff's allegations against the VPAA are that she failed to conduct an independent review that would have detected inconsistencies indicating unlawful discrimination and delayed notifying her of her adverse tenure decision.

The VPAA's review of Plaintiff's tenure application does not raise a reasonable inference of unlawful discrimination. Plaintiff's file accurately revealed that her application for tenure did not have the support of her white Chair, any member of the DRC or SRC, or the Dean. These committees were diverse by race and gender, which further undermines any inference of unlawful discrimination. Several committee members included statements addressing Plaintiff's poor relations with her colleagues. The Dean commented at length that he recommended deferral because there was uncertainty over Plaintiff's teaching and relationship with some of her students. Notwithstanding these undisputed facts, Plaintiff sees unlawful discrimination in the VPAA's failure to infer racism or sexism

from certain alleged inconsistencies in the application dossier and her decision not to recommend Plaintiff for tenure that year.

Review of the recommendations in the dossier shows that variations in Plaintiff's ratings for "service" arise, at least in part, from inconsistent interpretations of what "service" entailed. The form itself is somewhat ambiguous; it asks the reviewer to rate the applicant's "Service to the University or Community." Defs.' Ex. 15. Those who rated Plaintiff highly focused on her community-wide activities while those who rated her poorly focused on her poor relations with colleagues. *Id.* This is not the type of inconsistency that should prompt the VPAA to believe that racial or gender discrimination was influencing the evaluations.[20]

Plaintiff alleges that the VPAA should have been particularly suspicious of the evaluation prepared by DRC member Rosalyn Terborg-Penn. While the record shows that Terborg-Penn's evaluation demonstrated a limited understanding of Plaintiff's background and accomplishments and was therefore entitled to little weight, it does not raise a reasonable inference of unlawful discrimination by the actual decisionmakers.[21] Given the unanimous

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[20] By way of contrasting example, an inference of gender discrimination would be raised if Plaintiff's male colleagues reported that she was not collegial and gave her low service scores but her female colleagues reported that she was and gave her high scores.

[21] Terborg-Penn did not personally observe Plaintiff teach as a reviewer is supposed to do, but she also did not represent that she had observed Plaintiff teaching. Rather she openly expressed her view that Plaintiff had prevented her from scheduling observation time and that she considered that indicative of Plaintiff's uncooperative nature.

(Continued on following page)

recommendation against tenure at all levels, the inconsistencies cited by Plaintiff do not preserve her claim.[22]

Plaintiff's last stab at the VPAA and President challenges their handling of the deferral appeal process. Plaintiff essentially claims the review was a sham but cannot provide any evidence to refute the fact that she had a student rebellion in one of her classes, did not get along with her department colleagues, irrespective of race and gender, and did not have a single reviewer recommend her for tenure. After the VPAA heard and denied the appeal, Plaintiff appeared before a specially convened three-person appeal committee. The committee noted some minor problems with the tenure review process, such as the fact that Terborg-Penn had not observed Plaintiff's teaching, but still supported the decision to deny tenure. Defs.' Ex. 26. The President subsequently notified Plaintiff by letter that he accepted the committee recommendation, her appeals were at an end, and her contract would expire at the end of June 2003.

Considering the constraints of *Hill's* actual decision-maker test, the undisputed weaknesses in Plaintiff's

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Plaintiff also seeks to create a trial issue here out of the unrelated fact that Terborg-Penn has a contentious relationship with colleague Jo Ann Robinson, a white female. In 2001, Robinson filed a formal grievance accusing Terborg-Penn of unprofessional and unethical conduct. The grievance, however, raised no claims whatsoever of gender or racial discrimination. Instead, Robinson protested what she considered Terborg-Penn's tyrannical control over the History Department and its students as well as her extremely vindictive nature. Robinson's allegations, even if true, do not raise an inference of racial or gender discrimination.

[22] While Plaintiff alleges that the late-June notification of deferral was inconsistent with Defendants' March target date, that delay does not raise an inference of discrimination.

candidacy, and the Fourth Circuit's consistent admonition against interfering with a university's tenure process, the Court concludes that the plaintiff's evidence of pretext is clearly not "of such strength and quality as to permit a reasonable finding that the denial of tenure was obviously or manifestly unsupported." *Larebo v. Clemson Univ.*, 175 F.3d 1014, 1999 WL 152863 *4 (4th Cir. Mar. 22, 1999) (unpublished decision). Unless Plaintiff can make a valid mixed motive claim, Defendants are entitled to summary judgment on the Title VII claims.

b. Mixed motive

While the mixed motive test is traditionally considered more accommodating to the plaintiff, it does not diminish the fact that "[t]he ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination.'" *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 286 (4th Cir. 2004) *cert. dismissed*, 125 S. Ct. 1115 (2005) (quoting *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 153 (2000)). For the reasons just stated in Section III-C-1-a, *supra* pp. 23-35, Plaintiff has not created a triable issue on whether Defendant MSU's actual decisionmakers acted with unlawful discriminatory animus when they denied her tenure application and offered her a deferral. For this reason, Plaintiff's claim of race and gender discrimination fails under both tests and Defendant's motion for summary judgment on these claims will be granted.

D. Sexual harassment/ hostile environment

The Supreme Court holds that sexual harassment attributable to the employer is among those discriminatory employment actions proscribed by 42 U.S.C. § 2000e-2(a). *Faragher v. City of Boca Raton*, 524 U.S. 775, 786-87 (1998). Specifically, Title VII is violated "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (internal citations omitted) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)).

The Fourth Circuit directs, "[t]o state a hostile work environment claim, [a plaintiff] must allege that: (1) she experienced unwelcome harassment; (2) the harassment was based on her gender, race, or age; (3) the harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere; and (4) there is some basis for imposing liability on the employer." *Bass v. E.I. Dupont de Nemours & Co.*, 324 F.3d 761, 765 (4th Cir. 2003). Whether the severity or pervasiveness of the conduct makes it abusive "can be determined only by looking at all the circumstances." *Harris*, 510 U.S. at 23. The harassing conduct must be both objectively and subjectively abusive. *Harris*, 510 U.S. at 21-22.

With discovery complete and on the record facts, still construed in the light most favorable to Plaintiff, no reasonable factfinder could conclude that Plaintiff experienced sexual harassment that would constitute a valid hostile environment claim. Plaintiff simply has not

satisfied the third element's severity or pervasiveness requirement.

Plaintiff bases her hostile environment claims on the actions and omissions surrounding two students' submissions of internet pornography to her and three subsequent occasions where she was hugged at work. The Court addresses each in turn.

a. Pornography incidents

In May 2002, following class discussion in which some of Plaintiff's students expressed their favorable views of pornography, Plaintiff asked her Ethics and Values students to submit an extra-credit on-line assignment to construct a web page that included three internet links, and stated that those assignments that "investigate the topic of pornography" would be given additional credit. Pl.'s Opp. Ex. 20 at 316. Two black male students subsequently submitted web pages with links to explicit pornographic images, which Plaintiff opened and viewed. *Id.* While factually disputed, for summary judgment purposes the Court will presume that Plaintiff had explicitly told her students not to send her pornography and that the images included depictions of young black men sexually abusing older white women.

Following this incident, Plaintiff had very limited contact with each of the two students. In an e-mail dated July 19, 2002, almost two months after the incident, the first student e-mailed Plaintiff to see if he could make up the "incomplete" grade and to state that he had no intention of harassing her but merely was seeking extra credit

when he submitted the images.[23] Defs.' Ex. 61. In August 2002, the second student came to Plaintiff's campus office and asked to close the door to speak privately with her about the "incomplete" grade that he had received in the course. Pl.'s Opp. Ex. 20 at 473-75. According to Plaintiff, after she stated that the door would remain open, he became upset, shouted that he would complain to the Dean, and called her names. *Id.* Plaintiff states in her deposition that she did not believe he was threatening to physically harm her but was merely seeking a grade change.[24] *Id.*

While this Court in no way disputes the voluminous case law recognizing the gross inappropriateness of exposure to pornography in the workplace in all but the rarest circumstances (*e.g.*, federal agents seizing child pornography pursuant to their employment obligations), such

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[23] The entire e-mail message follows:

> My name is Devin Dockery, and I wanted to know if there was any way I can make up the "incomplete" grade I received for Spring 2002, Ethics and Values class. As of yet I haven't heard anything from the Dean, the department chair, nor you. I don't know where I stand with this situation, but if its [sic] possible I would like to know if I could complete the grade. For what its [sic] worth, harrassing [sic] you really was not my intent with making the web page. I was attempting to get the extra credit, which I really needed because I was in danger of failing the course. I know you feel it was intentional, but it was not. Please let me know where I stand with this harrassment [sic] issue.

Defs.' Ex. 61.

[24] Plaintiff's hostile environment claim survived Defendants' motion to dismiss, in part, because her complaint "allege[d] a physical threat against her person by one of the harassing students made after her initial communications to [Dean] Hollis were ignored." March 15, 2004, Mem. at 19. Full discovery, however, has revealed that no such threat was made.

exposure does not automatically create a jury issue. Examination of these facts under *Harris's* totality of the circumstances approach shows that no reasonable juror could conclude that Plaintiff was in an objectively abusive work environment. First, the pornographic transmission was from Plaintiff's students (who are neither employees of Defendant MSU nor named as defendants in this action) as part of an assignment where they were told by Plaintiff that addressing pornography would earn extra credit.[25] Second, the exposure to pornography was isolated to the two students' electronic submissions[26] on this

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[25] The court briefly notes that this would be a vastly different case if, for example, Plaintiff's colleagues or supervisors had gratuitously exposed her to pornography or encouraged her students to do so. Plaintiff's assertion, however, that she was forced by Defendant MSU to re-expose herself to the images because "the tone of [Dean Hollis's] letter has compelled me to print out the images" does not withstand reasoned analysis. Pl.'s Ex. 64 (EEO complaint letter).

Dean Hollis's letter, dated Sept. 24, 2002, stressed that any sexual harassment investigation would be conducted from the Office of Diversity and Equal Employment Opportunity, and then requested the offending students' work product as part of his own investigation of the academic disciplinary component. Defs.' Ex. 62. He plainly stated that if re-viewing the materials would further victimize her, she could provide him with a web address, or if that could not be done "without distress, then please let me know, and we will attempt to find an alternative method for you to provide me with the student's work product." *Id.* In her October 2002 EEO complaint, Plaintiff further criticized the Dean for sharing the images with the female VPAA pursuant to his investigation and added her conclusion that "*Dean Hollis, in sending these images to the VPAA, has in fact joined in the original act of sexual harassment against me, and has also committed an additional offense against [the VPAA.]*" Pl.'s Ex. 64 (emphasis in original).

[26] The first student's web page contained links entitled "Teen Sex," "online porn sites," and "Lesbian Kissing!" and contained short descriptions of the sites' pornographic content. Defs.' Ex. 54. The second student's web page consisted entirely of the "Intro Message" heading above the phrase "Hi I'm Chuck and I'm going to show you porno" and

(Continued on following page)

one assignment. Third, beyond the July 2002 e-mail and August 2002 office argument, Plaintiff did not have any further interaction with the offending students.

Plaintiff attempts to bolster the third element of her hostile environment claim by bootstrapping Defendants' allegedly inadequate response to the incidents, properly considered under the claim's liability analysis (prong four), to the abusiveness analysis (prong three). While Plaintiff makes solid arguments to support the fourth prong, employer liability based on its inadequate response,[27] in order to make Defendants' response relevant to her third prong, Plaintiff must show that Defendants' actions and omissions in response to this incident were so deficient as to foster an objectively abusive environment. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-22 (1993); *see also* March 15, 2004, Mem. at 17-19 (explaining how employer's callous or indifferent response to harassment may

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the "Favorite Links" heading above a solitary link titled "Black porno." Defs.' Ex. 55. No reasonable juror could conclude that someone reasonably seeking to avoid exposure to offensive pornography would have opened *both* students' web page links.

[27] To the extent that Plaintiff has accurately characterized Defendants' lack of action or communication in response to her sexual harassment claims, Defendant MSU's response is unimpressive. Plaintiff promptly sent a written memorandum to her acting department head, Janice McLane, alerting her to what had happened and plainly stating her desire to pursue a claim of sexual harassment against the students. Pl.'s Opp. Ex. 71. Weeks later, in a letter dated June 17, 2002, Plaintiff wrote to Dean Hollis asking, *inter alia*, "how to handle *sexual harassment by two students*." *Id.* (emphasis in original). Plaintiff's letter noted that she had alerted Dr. McLane, who was presumably following up on the incident with Dean Hollis, and briefly recounted the factual basis of the potential claim. *Id.* In October 2002, however, under Plaintiff's version of events, Defendant MSU's EEO officer still was not aware that the pornography incident had occurred.

contribute to finding of severe and pervasive harassment). This, she simply cannot do. The record clearly shows that Dean Harris did not compel Plaintiff to re-expose herself to the pornography, *supra* note 25, and Plaintiff was not subsequently threatened by her student, *supra* note 24. In this context, Chairman Begus's alleged statements that Plaintiff unwittingly invited the entire incident by her poorly conceived assignment speaks merely to the sufficiency of Defendants' response to Plaintiff's sexual harassment claims (prong four) and cannot fairly be construed as an independent action severe or pervasive enough to constitute sexual harassment (prong three).

b. Hugging incidents

Plaintiff also seeks to bolster her claim of severe and pervasive sexual harassment with three instances, all subsequent to the pornography incident, where she was hugged by men while at work. Yet, Plaintiff herself, in her October 30, 2002, letter to Defendant MSU's EEO Director, characterizes these hugs as "spontaneous hugs given to me with the most filial of intentions," that only initially appeared "aggressive" to her because of her previous exposure to pornography. Defs.' Ex. 57. Plaintiff's openly acknowledged misperception of filial workplace interactions as acts of sexually based aggression is only relevant to the alleged harm she has suffered from the exposure to pornography; no reasonable factfinder could conclude that these hugging incidents were independent acts of sexual harassment.

E. Section 1983 claims

As stated above, Plaintiff is unable to sustain her Title VII claims of race and gender discrimination in Defendants' tenure denial and sexual harassment; her § 1983 claim arises out of the same set of facts. Defendants are therefore entitled to summary judgment on the § 1983 claim. *See Beardsley v. Webb*, 30 F.3d 524, 529 (4th Cir. 1994) ("Courts may apply the standards developed in Title VII litigation to similar litigation under § 1983."); *see also Mosely v. N. Va. Community College*, 129 F.3d 1259, 1997 WL 716431 *2 (4th Cir. 1997) (stating that because "conduct failed to state a Title VII claim, it fails under § 1983 as well").

F. Motion to seal

Defendants' consent motion to seal the record will be denied. "[T]he presumption in favor of public disclosure of court records can only be overcome by a significant countervailing interest." *Under Seal v. Under Seal*, 326 F.3d 479, 486 (4th Cir. 2003) (citing *Rushford v. New Yorker*, 846 F.2d 249, 253 (4th Cir. 1988)). Defendants rest their motion on general statements invoking the confidentiality that normally attaches to student records and personnel decisions, but otherwise do not point to any significant countervailing interest to justify denying the public access to these court records. Defendants also cite no case law in support of their motion.

IV. CONCLUSION

For these reasons, Defendants' motion for summary judgment will be granted and their motion to seal will be

denied. A separate order consistent with the reasoning of this Memorandum will follow.

/s/
William M. Nickerson
Senior United States
District Judge

Dated: August 2, 2005

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Filed April 3, 2006

No. 05-1891
CA-03-1600-1-WMN

MARIANNE SAWICKI

Plaintiff-Appellant

v.

MORGAN STATE UNIVERSITY;
EARL S. RICHARDSON; CLARA I. ADAMS;
BURNEY J. HOLLIS; OTTO BEGUS;
STATE OF MARYLAND

Defendants-Appellees

On Petition for Rehearing and Rehearing En Banc

The Appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge King, Judge Shedd, and Senior Judge Hamilton.

For the Court

/s/ Patricia S. Connor
CLERK

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(2)

No. 06-306

FILED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

MARIANNE SAWICKI,
Petitioner,

v.

MORGAN STATE UNIVERSITY
and STATE OF MARYLAND,
Respondents.

On Petition For A Writ Of Certiorari
To the United States Court Of Appeals
For the Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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H. Res. 547

In the House of Representatives, U.S.,
November 16, 2005.

Whereas the Palmdale School District sent parents of elementary school students at Mesquite Elementary School in Palmdale, California a letter requesting consent to give a psychological assessment questionnaire to their first, third, and fifth grade students;

Whereas without the informed consent of their parents, the young students were instead administered a questionnaire that contained sexually explicit and developmentally inappropriate questions;

Whereas seven parents subsequently filed a complaint against the Palmdale School District in a Federal district court;

Whereas on November 2, 2005, a 3-judge panel of the Ninth Circuit Court of Appeals affirmed the decision of the United States District Court for the Central District of California in the case (Fields v. Palmdale School District) and held that parents "have no constitutional right . . . to prevent a public school from providing its students with whatever information it wishes to provide, sexual or otherwise, when and as the school determines that it is appropriate to do so";

Whereas the Ninth Circuit stated, "once parents make the choice as to which school their children will attend, their fundamental right to control the education of their children is, at the least, substantially diminished";

Whereas in Meyer v. Nebraska, 262 U.S. 390, 401 (1923), the Supreme Court recognized that the liberty guaranteed by the 14th amendment to the Constitution encompasses "the power of parents to control the education of their [children]".

Whereas the Supreme Court in Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925), highlighted the Meyer doctrine that parents and guardians have the liberty "to direct the upbringing and education of children under control" and emphasized that "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations";

Whereas in Wisconsin v. Yoder, 406 U.S. 205, 232-33 (1972), the Supreme Court acknowledged that "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition. . . . The duty to prepare the child for 'additional obligations', referred to by the Court [in Pierce] must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship";

Whereas a plurality of the Supreme Court has stated, "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children" (Troxel v. Granville, 530 U.S. 57, 66 (2000) (plurality opinion));

Whereas the Ninth Circuit's decision in Fields v. Palmdale School District presupposes that "parents make the choice as to which school their children will attend" when, in fact, many parents do not have such a choice;

Whereas the decision in Fields establishes a dangerous precedent for limiting parental involvement in the public education of their children; and

Whereas the rights of parents ought to be strengthened whenever possible as they are the cornerstone of American society: Now, therefore, be it

Resolved, That it is the sense of the House of Representatives that –

(1) the fundamental right of parents to direct the education of their children is firmly grounded in the Nation's Constitution and traditions;

(2) the Ninth Circuit's ruling in Fields v. Palmdale School District undermines the fundamental right of parents to direct the upbringing of their children; and

(3) the United States Court of Appeals for the Ninth Circuit should agree to rehear the case en banc in order to reverse this constitutionally infirm ruling.

Attest:

Clerk:

QUESTION PRESENTED

Did the court of appeals correctly affirm the district court's entry of summary judgment denying a white female professor's Title VII race and gender discrimination claims arising from denial of tenure where undisputed facts in the record showed that in her seven-member department whites outnumbered blacks 5 to 2 and the male-female ratio was 4:3; that the plaintiff did not get along with her department colleagues or her students regardless of their race or gender; that not one of the many faculty members who reviewed her application at various stages recommended her for tenure; that an applicant of her same race and gender was granted tenure not long after the plaintiff's application was denied; and that statistically applicants for tenure and promotion at the defendant university fared comparably irrespective of race or gender?

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STATEMENT OF THE CASE

Petitioner Marianne Sawicki, a female Caucasian, is a former associate professor in the Department of Philosophy and Religious Studies at Morgan State University. App. 2a. Her three-year contract of employment began in 2000 and expired on June 30, 2003, after she was denied tenure in June 2002. App. 3a. As the district court found from undisputed facts and the court of appeals affirmed, in her short time at the University, Ms. Sawicki had "a 'major confrontation'" with students who "were male and female, white and black," App. 4a, 5a n.1, and she was "the subject of a petition drive by 14 of her students" seeking to have her investigated "for perpetuating 'an inhospitable academic environment,'" App. 6a. Ms. Sawicki "did not get along with her department colleagues, irrespective of race and gender, and did not have a single reviewer recommend her for tenure." App. 31a. "The President, VPAA [Vice President for Academic Affairs], Dean, and Chair who all agreed that Plaintiff should not have been tenured in 2002 are the same individuals who all agreed that she should have been hired in 2000." App. 10a.

When her application for tenure was denied in 2002, Ms. Sawicki was offered but did not accept the opportunity to defer the tenure decision and reapply the following academic year. App. 8a. Instead, she pursued an administrative appeal of the tenure denial. App. 8a. *See also* District Court's March 15, 2004 Memorandum Opinion partially granting defendants' motion to dismiss, reproduced in Respondent's Appendix ("R. App.") at R. App. 16. Since Ms. Sawicki did not accept the offered deferral of tenure, her employment at the University ended when her administrative appeal was denied and her contract expired in June 2003. App. 9a; R. App. 16.

Ms. Sawicki subsequently filed a complaint in the

United States District Court for the District of Maryland alleging that the denial of tenure and the expiration of her contract of employment at the University resulted not from her well-documented lack of rapport with students and faculty members irrespective of their race or gender, but from race and gender discrimination on the part of the Chair of her department and others at the University. App. 10a-11a.

However, as both courts below determined, the extensive record developed in this case does not support an inference that Ms. Sawicki was a victim of race or gender discrimination. In her seven-member department, whites outnumbered blacks 5 to 2 and the male-female ratio was as equal as possible at 4:3. App. 9a. Comprehensive personnel records showed that in the period between 1999 and 2005, applicants for tenure and promotion at the University "fared comparably across racial and gender lines." App. 26a. Another white woman in Ms. Sawicki's department applied for and was granted tenure in 2003, the year Ms. Sawicki's contract ended. App. 26a.

By contrast, Ms. Sawicki's application for tenure met with the unanimous disapproval of all who considered it, regardless of their race or gender. App. 7a. The established tenure process was multi-level and campus-wide, including recommendations from the Chair of the department, a departmental review committee, a school-wide committee, the Dean of the College of Liberal Arts, and the Vice President of Academic Affairs ("VPAA"). App. 7a-8a. As required by statute, the President makes the final decision as to whether to grant tenure. *See* Md. Code Ann., Educ. §14-104(j)(4)(iv).

Not one of the many individuals charged with

reviewing and making tenure recommendations voted to grant Ms. Sawicki tenure in 2002. App. 7a. As the district court found from undisputed evidence, "evaluations at every stage of the tenure review process reflected concerns about her teaching and her fractured relationships with many of her students as well as her problems relating to her colleagues." App. 7a. The departmental committee, the campus-wide committee, and the Chair all recommended denial of tenure. App. 7a. After conducting his own review, the Dean recommended that Ms. Sawicki's application for tenure be deferred for one year, and the VPAA concurred. App. 7a, 8a. The President agreed and sent Ms. Sawicki a letter, dated June 28, 2002, containing "an unambiguous offer of a deferral if it was accepted by Sawicki within 10 days." R. App. 16. *See also* App. 8a, 9a. "The letter further stated that not accepting the terms of the offer would result in a determination that Sawicki had not met the criteria for tenure and that her employment would terminate on June 30, 2003." R. App. 16. *See* App. 8a. As the district court determined, "[r]egardless of Plaintiff's beliefs as to what she was doing," the "facts in the record and law of the case show that she did not accept the deferral offer" within the required time period. App. 9a.

Instead, Ms. Sawicki lodged an administrative appeal of the tenure denial. App. 8a. A Faculty Appeals Committee was convened, heard the appeal and determined that there was no procedural error or violation of tenure process policies. App. 9a. The President notified Ms. Sawicki that her appeal was denied and that her employment would terminate accordingly at the end of her contract, on June 30, 2003. App. 9a.

Ms. Sawicki bases her Title VII claim on allegations that the University's decisionmakers, up to

and including the President, engaged in "racial politics" and had an anti-female bias, resulting in the denial of her tenure application. App. 10a-11a. As examples of alleged discrimination, she points to various actions on the part of the Chair and, to some extent, the Dean, the VPAA and the President. App. 10a-11a.

The district court rejected these arguments in an unpublished memorandum opinion, App. 3a-40a, in which the court considered the Title VII claim under both the mixed motive analysis set forth in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), and the single motive analysis of *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), *see* App. 22a, as well as pertinent Fourth Circuit authority, *see* 14a, 17a, 23a (citing *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 286 (4th Cir. 2004)(en banc), *cert. dismissed*, 543 U.S. 1132 (2005); *Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 318 n.5 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 1033 (2006); *Jimenez v. Mary Washington College*, 57 F.3d 369, 377 (4th Cir. 1995)). The district court concluded that in light of "undisputed weaknesses in Plaintiff's candidacy" for tenure, App. 31a-32a, "no reasonable juror could find that the circumstances surrounding Plaintiff's tenure denial amount to unlawful discrimination or otherwise conclude that discrimination played a role in the tenure denial," App. 24a. The district court further determined that Ms. Sawicki "has not created a triable issue" on whether the University's decisionmakers "acted with unlawful discriminatory animus when they denied her tenure application and offered her a deferral." App. 32a.

Finding no liability on the part of the University, the district court granted summary judgment on the Title VII claim as to denial of tenure. App. 32a. The district

court also granted summary judgment for defendants on Ms. Sawicki's Title VII sexual harassment and hostile environment claims and her discrimination claims under 42 U.S.C. § 1983. App. 33a-34a, 39a. Earlier in the litigation, the district court had granted defendants' motion to dismiss various other claims under federal and state law, including a retaliation claim. R. App. 1-17. The petition pending before this Court does not seek review of the district court's rulings denying Ms. Sawicki's claim of sexual harassment and hostile environment, her § 1983 discrimination claim, her retaliation claim, or any of her other claims that were dismissed by the district court.

In a two-page, unpublished per curiam decision, the court of appeals affirmed on the reasoning of the district court. App. 1a-2a. Ms. Sawicki's petition for rehearing and rehearing en banc was denied. App. 41a.

REASONS FOR DENYING THE WRIT

THE PETITION DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

Further review of this case is unwarranted because the unpublished decisions below rest on a fact-specific determination that conforms with prior decisions of this Court and gives rise to no error that would justify the exercise of this Court's discretionary jurisdiction. Both courts below concluded from undisputed evidence in the record that "no reasonable juror could find that the circumstances surrounding Plaintiff's tenure denial amount to unlawful discrimination or otherwise conclude that discrimination played a role in the tenure denial." App. 24a. Whether the record is evaluated under the legal analysis applied by the district court and the court of

appeals, or under the alternative analyses in the decisions from other circuits cited in the petition, the undisputed facts do not permit a finding of unlawful employment discrimination. Accordingly, this case presents a poor vehicle for considering the legal question posed in the petition, since resolution of that issue is unlikely to alter the outcome of this case.

CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted,

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November 1, 2006

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARIANNE SAWICKI,	:	
v.	:	Civil Action:
	:	WMN-03-1600
MORGAN STATE UNIVERSITY, *et al.*	:	

MEMORANDUM

Before the Court is Defendants' Motion to Dismiss. Paper No, 19. The Motion has been fully briefed and is ripe for decision.[1] Upon review of the pleadings and applicable case law, the Court determines that no hearing is necessary (Local Rule 105.6), and that Defendants' motion will be granted in part and denied in part.

I. BACKGROUND

Plaintiff Marianne Sawicki is a former Associate Professor in Defendant Morgan State University's ("MSU") Department of Philosophy and Religious Studies (the "Department"). Sawicki was denied tenure and terminated from her teaching position at MSU effective June 2003. She is suing the State of Maryland (the "State"), MSU, its President (Earl Richardson), Vice President for Academic Affairs (Clara Adams), Dean of the College of Liberal Arts (Burney Hollis), and Department Chair (Otto Begus) (collectively, the "Individual Defendants") for race, gender,

[1] Also pending is Plaintiff's Motion for Leave to File Supplemental Opposition. Paper No. 26. Because the Supplemental Opposition responds directly and briefly to the material presented in Defendants' Reply in Support of their Motion to Dismiss, the Court will grant Plaintiff's motion and accept the pleading as filed.

disability and age discrimination, as well as sexual harassment, retaliation, breach of contract, wrongful termination of employment, and injunctive relief. The factual allegations included in the Complaint to support these claims are as follows.

Sawicki, a 53 year old white female, was hired by MSU, a historically black institution, on March 28, 2000. She alleges that her Department Chair, Otto Begus, has made it a priority to recruit and retain black professors while systematically holding back Sawicki's professional development so that she would not achieve tenure. In comparison to a similarly situated African (Eritrean) male colleague, Sawicki was assigned a heavier teaching load, received less time for research, and was warned not to develop extra-curricular contact with students.

When Sawicki was regularly harassed and heckled by students during the spring semester of 2001, Begus refused to provide any support and instead berated her as having an attitude of superiority and condescension; thinking that she was "a superior white woman" who had come to MSU to teach "ignorant black people." Complaint at ¶¶ 30-31. Begus also publicly reprimanded and criticized Sawicki at a Departmental social gathering later that semester. He discontinued conducting student evaluations of Sawicki when the results were consistently high, and neglected to conduct her required regular supervisory evaluations. When Sawicki applied for tenure in the fall of 2001, Begus recommended her for deferral due to his doubts regarding Sawicki's ability to relate to black students, despite the favorable ratings she had received from her students.

During the spring semester of 2002, Sawicki alleges a lack of support from Dean Hollis and Begus, among others, when she reported physical intimidation and a racial slur made against her by a black male student. She alleges similar inappropriate responses to her reports concerning two incidents, occurring that same semester, in which male students submitted violent pornographic images to her in online assignments. After receiving no reply to several letters sent to Hollis concerning these incidents, Sawicki learned from Begus that the incidents would count against her in her re-application for tenure in the fall of 2002. She again wrote letters to Hollis concerning this action threatened by Begus. Subsequently, Hollis falsified records in an attempt to make it appear that he had responded to Sawicki's correspondence in a timely manner.

Sawicki also alleges a lack of reasonable accommodations to her teaching schedule throughout the 2002-03 school year to compensate for the partial paralysis of her right leg, due to a 1988 spinal injury, and her Hashimoto's thyroiditis. Her partial paralysis makes Sawicki more likely to trip and fall, and unable to stand for long periods of time without pain. Sawicki's thyroiditis is regulated through diet, and requires that she be allowed sufficient breaks between classes for meals. Despite her request for accommodations, Sawicki was assigned a class load more extreme than other professors, including twelve hour days with five hour lecture assignments that did not allow her to break for meals nor enable her to physically transport necessary equipment from classroom to classroom.

Finally, Sawicki alleges a host of procedural irregularities in her tenure review process and her communications concerning same over the course of the summer and

fall of 2002. These communications with President Richardson, Vice President Adams, Hollis, and Begus, ultimately resulted in MSU setting June 30, 2003, as the termination date for her employment. On February 27, 2003, Sawicki filed a complaint with the EEOC; she later received a right to sue letter on March 5, 2003. This nine count suit was filed on June 2, 2003, pursuant to 42 U.S.C. § 1981, Title VII, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and Maryland common law. Defendants now move for dismissal of the entire complaint on a variety of grounds.

II. STANDARD OF REVIEW

A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure should not be granted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief." *Conley v. Gibson,,* 355 U.S. 41, 45-46 (1957). In considering Defendants' Motion to Dismiss, the Court "must accept the factual allegations of the complaint as true and must view the complaint in the light most favorable to the plaintiff." *GE Inv. Private Placement Partners II v. Parker,* 247 F.3d 543, 548 (4th Cir. 2001) (citation omitted). Where the matter before the Court involves "a civil rights complaint, [the Court] must be especially solicitous of the wrongs alleged and must not dismiss the complaint unless it appears to a certainty that the plaintiff would not be entitled to relief under any legal theory which might plausibly be suggested by the facts alleged." *Edwards v. City of Goldsboro,* 178 F.3d 231, 244 (4th Cir. 1999) (internal quotations omitted).

III. DISCUSSION

As a preliminary matter, Defendants claim that it is impossible to discern under which statutes Sawicki seeks relief due to her failure to include a specific statutory reference in each count of her complaint. Defendants nevertheless are able to make cogent arguments concerning each of the counts, most of which obviously relate to one or more of the statutes cited in ¶ 2 of Sawicki's Amended Complaint. The only counts for which there could be legitimate confusion, and for which Defendants' seek dismissal without prejudice, are counts I and II (concerning gender and race discrimination). Sawicki clarifies in her Opposition that she seeks relief under both 42 U.S.C. § 1981 and Title VII for counts I and II, in addition to pointing out that the elements of proof are the same under each statutory cause of action. *See Warren v. Halstead Indus., Inc.,* 802 F.2d 746, 754 (4th Cir. 1986), Accordingly, the Court will not grant dismissal of any count for failure to set forth its statutory basis.

A. Eleventh Amendment Immunity

Defendants argue that pursuant to the Eleventh Amendment, Counts IV (disability discrimination), V (age discrimination), VII (Breach of Contract), VIII (Wrongful Termination), and IX (Injunctive Relief) should be dismissed as to the State, MSU, and the Individual Defendants, insofar as they are sued in their official capacities. The Eleventh Amendment provides that states cannot be sued in federal court without their consent. *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 54 (1996). As "an arm of the State," MSU enjoys the protection of this immunity as well. *See* Md. Ann. Code, Educ. § 14-101 (2001) (establishing MSU as "the State's public urban university with a

mission of instruction, research, and service."); *Palotai v. Univ. of Md. Coll. Park,* 959 F. Supp. 714, 716 (D. Md. 1997) (holding that, as a state agency, the University of Maryland is protected by Eleventh Amendment Immunity (quoting *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 280 (1997)). Furthermore, because a "suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office," such officials fall under the aegis of the Eleventh Amendment as well; a suit against officials acting in their official capacity "is no different from a suit against the State itself." *Will v. Mich. Dep't of State Police,* 491 U.S. 58, 71 (1988).

This sovereign immunity, however, may be waived; states may exercise their own discretion and waive their immunity, or Congress may design a law that specifically abrogates states' protection. To determine when Congress intended a federal statute to supercede this sovereign immunity, courts must determine "first, whether Congress has unequivocally expressed its intent to abrogate the immunity; and second, whether Congress has acted pursuant to a valid exercise of power." *Seminole Tribe,* 517 U.S. at 55. The Supreme Court has explained "that Congress may, in determining what is appropriate legislation for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts." *Fitzpatrick v. Bitzer,* 427 U.S. 445, 456 (1976) (internal quotation marks omitted). As Defendants implicitly concede, Congress validly abrogated the Eleventh Amendment immunity of the states as to claims under Title VII, making those claims by Sawicki in

Counts I, II, III, and VI impervious to attack on Eleventh Amendment grounds. *See Fitzpatrick* at 452-53.[2]

1. Age and Disability Discrimination Claims

Several of Sawicki's claims, however, are subject to sovereign immunity protection. Sawicki's claim in Count V that Defendants violated the Age Discrimination in Employment Act ("ADEA"), is barred by sovereign immunity, insofar as it is brought against the State, MSU, or the Individual Defendants in their official capacities. *Kimel v. Florida Board of Regents,* 528 U.S. 62, 74 (2000). Sawicki's claim of disability discrimination under the Americans with Disabilities Act ("ADA"), against the same list of defendants in Count IV is also barred by sovereign immunity pursuant to decisions of the Supreme Court and the Fourth Circuit. *See Board of Trustees of the Univ. of Alabama v. Garrett,* 531 U.S. 356 (2001) (holding that Title I of the ADA, the statute's employment discrimination provisions, did not abrogate the States' sovereign immunity); *Wessel v. Glendening,* 306 F.3d 203, 215 (4th Cir. 2002) (concluding that Title II of the ADA was not a valid exercise of Congress's power to abrogate states' sovereign immunity). Although Sawicki points out that the Supreme Court currently has pending before it a case to resolve the split in circuits concerning the validity of Congress's

[2] To the extent that the claims in Counts I and II (against MSU, the State, and the Individual Defendants in their official capacities) are also based on 42 U.S.C. § 1981, however, they are barred by Eleventh Amendment immunity. *Persaud v. Morgan State University,* 34 F.3d 1066, 1994 WL 446797, *1 (4th Cir. 1994) ("The district court properly found that the Eleventh Amendment bars Appellant's 42 U.S.C. §§ 1981, 1983 claims and his breach of contract claim against the university.").

attempt to abrogate state immunity through Title II, this Court is compelled to follow the existing law of the Fourth Circuit and order dismissal.

2. Maryland Common Law Claims

Defendants next argue that Sawicki's claims based on Maryland common law in Count VII (Breach of Contract) and Count VIII (Wrongful Termination) are also barred by the Eleventh Amendment. Although Sawicki's Amended Complaint alleges compliance with the procedures of the Maryland Tort Claims Act, Defendants argue that the waivers of sovereign immunity in the Maryland code for tort and contract claims are limited to suits brought in state, not federal, courts. *See* Md. Code Ann., State Gov't §§ 12-104, 201 (waiving immunity to actions "in a court of the State"); *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 241 (1985) (concluding that a state's waiver of immunity from suit in state court "is not enough to waive the immunity guaranteed by the Eleventh Amendment" for federal court jurisdiction). In her Opposition, Sawicki does not dispute this legal argument, but instead asks that the Counts be dismissed without prejudice to allow them to be filed in State court. Since the Defendants make no challenge as to the sufficiency of the breach of contract and wrongful termination claims, they will be dismissed without prejudice.

3. Injunctive Relief

Defendants argue that Count IX, which seeks reinstatement of Sawicki as an MSU professor and a grant of tenure, without stating a cause of action for the relief requested, should likewise be dismissed on Eleventh

Amendment grounds. Were this a properly plead cause of action, it would still be dismissed as to MSU and the State because "the relief sought by a plaintiff suing a State is irrelevant to the question of whether the suit is barred by the Eleventh Amendment." *Seminole Tribe v. Florida,* 517 U.S. 44, 58 (1996). Sawicki contends in opposition, however, that the count should not be dismissed as an action against the individual defendants in their official capacities pursuant to the *Ex parte Young* exception for ongoing violations of federal law that can only be cured by prospective relief, *Kentucky v. Graham,* 473 U.S. 159, 167 n.14 (1985) (citing *Ex parte Young,* 209 U.S. 123 (1908)).

In acknowledgment that the exception "does not apply when the alleged violation of federal law occurred entirely in the past[,]" *DeBauche v. Trani,* 191 F.3d 499, 505 (4th Cir. 1999), Sawicki cites to page 15 of her Amended Complaint as evidence that she explicitly alleged a continuing violation. Despite Sawicki's arguments to the contrary, the cited page admits that the alleged continuing violations "culminat[ed] in the wrongful termination of her employment on June 10, 2003[.]" Compl. at ¶ 53. The Court concludes that Sawicki's bare assertions that a continuing scheme exists to deny her of her civil rights is not enough to bring her extraordinary request of injunctive relief[3] within the *Ex parte Young* exception because "[m]ere conjecture is insufficient to transform a one-time event into a continuing governmental practice or an ongoing

[3] The Court notes that Sawicki's request, to be reinstated as an MSU professor despite the expiration of her contract term, and to be granted tenure, would put her in a better position than she enjoyed at any point during her employment at MSU.

violation." *DeBauche,* 191 F.3d at 505. Accordingly, Count IX will be dismissed in its entirety.

B. Liability of Individual Defendants

Defendant argues that the claims against the Individual Defendants in their personal capacities should be dismissed from Counts I (race discrimination), II (gender discrimination), III (sexual harassment), and VI (retaliation) since Title VII, the basis for the aforementioned counts, provides no cause of action against employees as individuals. *Lissau v. Southern Food Service, Inc.,* 159 F.3d 177, 180-81 (4th Cir. 1998). The Fourth Circuit has held that the ADEA also limits liability to the employer, rather than individual employees, and so Defendants assert that dismissal of the Individual Defendants is likewise warranted as to Count V (age discrimination). *Birkbeck v. Marvel Lighting Corp.,* 30 F.3d 507, 510-11 (4th Cir. 1994). Finally, since the ADA's definition of employer is similar to that found in both Title VII and the ADEA, Defendants argue that this Court should dismiss Count IV (disability discrimination) against the Individual Defendants, in keeping with other circuits which have considered the issue. *See, e.g., Hunt v. District of Columbia,* 2002 WL 1997987 (D.C. Cir. 2002).

Sawicki does not appear to contest most of these arguments as to individual liability, instead choosing to focus her counter arguments on whether each of the above mentioned statutes creates the possibility of suits against the Individual Defendants in their official capacities. As explained in Part A, *supra,* Sawicki's argument is inapposite as to Counts IV and V because those claims are barred by Eleventh Amendment Immunity. As to Counts I-III and

VI, Defendants, in their Reply, do not dispute that Title VII allows for official capacity actions against individuals, but instead contest whether Sawicki's EEOC complaint ran afoul of Title VII's naming requirement by failing to specifically list the Individual Defendants. 42 U.S.C. § 2000e-5(f)(1). In her Surreply, Sawicki contradicts this assertion by referencing the hundreds of pages of documentation filed with the EEOC that described the discrimination she experienced at the hands of each of the individual defendants. Without wading into this potential quagmire of exhibits at the motion to dismiss stage, the Court simply notes that any remaining official capacity claims would be redundant of Sawicki's already asserted claims against the university and state itself, and so will be dismissed in an effort to streamline the proceedings. The personal capacity claims against the Individual Defendants based on Title VII, the ADA or the ADEA will also be dismissed.

The only remaining argument concerning the Individual Defendants in their personal capacities is whether Sawicki may amend her complaint to assert her § 1981 claims in an action formally brought under § 1983. Sawicki admits that under current Fourth Circuit law, a § 1983 action is the "exclusive federal remedy for violation of the rights guaranteed in § 1981." *Dennis v. County of Fairfax,* 55 F.3d 151, 156 (4th Cir. 1995) (quoting *Jett v. Dallas Indep. School Dist.,* 491 U.S. 701 (1989)). Yet, as of now, Sawicki has not officially plead 42 U.S.C. § 1983 as a basis for recovering monetary damages against the Individual Defendants. Accordingly, the claims, as currently plead, against the Individual Defendants in Counts I and II based on § 1981 will be dismissed. Sawicki will,

however, be granted leave to amend her complaint to properly plead these counts under 42 U.S.C. § 1983.

C. Sexual Harassment

Defendants challenge Count III as alleging insufficient facts to state the required elements of Sawicki's claim of sexual harassment. In evaluating this argument, the Court is mindful of the Supreme Court's guidance that an employment discrimination plaintiff need not plead sufficient facts for a prima facie case of discrimination to survive a motion to dismiss. *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 510-11 (2002). The Fourth Circuit has subsequently clarified, however, that a hostile work environment plaintiff's complaint must still allege facts which, liberally construed, are "sufficient to state the elements of her claims." *Bass v. E.I. Dupont de Nemours & Co.*, 324 F.3d 761, 765 (4th Cir. 2003), *cert. denied*, 124 S.Ct. 301 (2003); *Cf. Cockerham ex rel Cockerham v. Stokes County Bd of Educ.*, 2004 WL 237754, at *4 (M.D.N.C. Feb. 3, 2004) (acknowledging the tension between the holdings of *Swierkiewicz* and *Bass*). In light of this potentially contradictory instruction, this Court is constrained by its Court of Appeals to evaluate whether Sawicki has sufficiently alleged that: "(1) she experienced unwelcome harassment; (2) the harassment was based on her gender . . . ; (3) the harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere; and (4) there is some basis for imposing liability on the employer." *Bass*, 324 F.3d at 765.

Construing the facts alleged in the light most favorable to Sawicki, the Court readily concludes that both the pornography submitted to her by male students, and the

callous and insufficient responses to her complaints by male colleagues, could be manifestations of harassment based on Sawicki's gender. As is evidenced by the many cases cited on pages 20 and 21 of Sawicki's Opposition, exposure to pornography in the workplace, whether or not specifically targeting a plaintiff, is a classic facet of sexual harassment case law. Sawicki's complaint specifically alleges a failure by her male colleagues to respond to multiple written communications regarding her exposure to pornographic images of "young black men engaged in violent acts against mature white women[,]" that she found offensive and threatening. Compl. at ¶¶ 63-64. Thus, Sawicki alleges facts fulfilling the first two elements of her claim of sexual harassment; that the harassment was unwelcome and based on her gender.

Whether Sawicki's complaint satisfies the third element, that the harassment was so severe or pervasive as to alter her conditions of employment, is a closer question. While Sawicki may not ultimately establish this element, the Court cannot agree with Defendants' contention that MSU's response to Sawicki's complaints is irrelevant to the severity or pervasiveness element of her claim. Considering all of the circumstances in this instance requires the Court to take into account the alleged facts that incidents which Sawicki found offensive and threatening were not treated as serious by MSU. Not only could Sawicki not rely on her concerns being promptly investigated, or even acknowledged, but she was told that voicing those concerns would count against her at the crucial juncture when she would be reviewed for tenure. The Court can only surmise that MSU's own administration recognized the potential inappropriateness of their non-response by Dean Hollis's alleged falsification of

records to make it appear as if he had responded to Sawicki's correspondence in a timely manner.

Additionally, in Exhibit 6 of Sawicki's Complaint, she alleges multiple additional instances which could arguably have contributed to her hostile work environment, including threats by students and on-campus vandalism of her car. That same exhibit, a copy of her formal complaint of sexual harassment, also describes touching by students and staff which occurred subsequent to the pornography submissions and their aftermath. Sawicki alleges that she perceived this spontaneous hugging as aggressive at the moment of occurrence. That she later recognized that the students involved likely had no improper intentions may support the argument that these incidents were not severe in and of themselves, but the Court concludes that this evidence of Sawicki's altered perceptions points toward the triggering events as being significant enough to have altered her employment conditions and created a hostile environment. At least at this stage, Sawicki has alleged sufficient facts to meet the third element of her claim.

The Court concludes that Sawicki has also alleged sufficient facts to meet the final element of her claim, that some basis exists for imputing liability to MSU. As discussed above, Sawicki's complaint focuses on MSU's inaction and then hostile reaction in the face of her efforts to request support for the initial harassing incidents. Defendants argue that the Court should evaluate this element under a negligence theory for non-supervisor harassment. Assuming arguendo that they are correct, and it is by no means clear that they are, Sawicki's Complaint at Exhibit 6 alleges a physical threat against her person by one of the harassing students made after her initial communications to Hollis were ignored. This is enough to

raise the specter of an inadequate employer response that facilitated further acts of harassment. Accordingly, Sawicki has sufficiently plead this and every other element of her claim of sexual harassment to survive Defendants' motion to dismiss.

D. Retaliation

Sawicki alleges in Count VI of her complaint that her employment with MSU was wrongfully terminated in retaliation for her attempts "to utilize the policies and procedures in place at MSU dealing with her tenure review (see Count VII), the accommodations required for her physical disability as described in Count IV above, and her claim of sexual harassment, against university administrators[.]" Complaint at ¶ 112. As discussed in Part A, *supra,* Sawicki's claims in Counts IV and VII are barred by sovereign immunity. Thus, Sawicki's cause of action for retaliation, if it exists, falls under Title VII.

To establish the elements of a claim for retaliation under Title VII, Sawicki must allege facts sufficient to state that: "1) she engaged in protected activity; 2) the employer took an adverse employment action against her; and 3) a causal relationship existed between the protected activity and the asserted adverse action." *Von Gunten v. Maryland,* 243 F.3d 858, 863 (4th Cir. 2001). The adverse action that Sawicki alleges that she suffered is the termination of her employment, which would clearly meet prong two. Assuming that prong one is met by her reporting of sexual harassment, the Court nonetheless finds her allegations under the third prong (causation) to be deficient.

Sawicki alleges that in retaliation for her letters in September of 2002 to Dean Hollis, written in an attempt to prevent Dr. Begus from retaliating against her concerning her students' submission of pornography, President Richardson "immediately notified Dr. Sawicki that her employment would terminate in June 2003 and he withdrew his June 28, 2002 deferral of her tenure decision." Complaint at ¶¶ 66, 67. The glaring problem with this allegation is that Richardson's June 28, 2002, letter contained an unambiguous offer of a deferral *if it was accepted by Sawicki within 10 days.* Pl's. Exh. 16. The letter further stated that not accepting the terms of the offer would result in a determination that Sawicki had not met the criteria for tenure and that her employment would terminate on June 30, 2003. *Id.* Sawicki does not dispute this interpretation of the letter as evidenced by her statement in ¶ 116 of her Complaint that her termination was "first noted by way of a letter from Dr. Richardson dated June 28, 2002[.]" Nor does Sawicki assert that she did in fact accept the letter's offer before it expired.

Thus, the decision to terminate Sawicki was effectively made months prior to her allegations of protected conduct. Richardson's letter of September 18, 2002, which confirmed her termination date subsequent to Sawicki's letters to Hollis (but still prior to her formal complaint of sexual harassment that was not filed until October 30, 2002) could not have withdrawn the deferral offer because there was nothing to withdraw. Since the complaint nowhere alleges that the June 28, 2002, letter was the consequence of protected activity by Sawicki, it fails to sufficiently allege that "a causal relationship existed between the protected activity and the asserted adverse

action." *Von Gunten,* 243 F.3d at 863. Accordingly, Sawicki's claim of retaliation will be dismissed.

IV. CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss will be granted in part and denied in part. Counts IV, V, VI, and IX will be dismissed in their entirety. Counts VII and VIII will likewise be dismissed in their entirety, but without prejudice to allow Sawicki to refile them in state court. Counts I, II, and III will be dismissed as to the Individual Defendants, in their official and personal capacities, insofar as they are based on Title VII. Counts I and II will also be dismissed against the Individual Defendants insofar as they are based on § 1981, but without prejudice to allow Sawicki to amend her complaint to include § 1983. The Motion to Dismiss Counts I, II, and III against MSU and the State will be denied. An order consistent with this memorandum will issue.

/s/
William M. Nickerson
Senior United States
District Judge

Dated: March 15, 2004.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARIANNE SAWICKI,	:	
v.	:	Civil Action:
	:	WMN-03-1600
MORGAN STATE UNIVERSITY, *et al.*	:	

ORDER

Pursuant to the foregoing memorandum, and for the reasons stated therein, IT IS this 15th day of March, 2004, by the United States District Court for the District of Maryland, hereby ORDERED:

1. That Defendants' Motion to Dismiss (Paper No. 19) is hereby GRANTED in part and DENIED in part, in that it is:

a. GRANTED as to Counts IV, V, VI and IX,

b. GRANTED as to Counts VII and VIII, but dismissed without prejudice,

c. GRANTED as to the Individual Defendants in Counts I, II, and III, insofar as the claims are based on Title VII,

d. GRANTED as to the Individual Defendants in Counts I and II insofar as the claims are based on § 1981, but dismissed without prejudice, and

e. DENIED as to all remaining Counts;

2. That Plaintiff's Motion For Leave to File a Surreply in Opposition to Defendants' Motion to Dismiss (Paper No. 26) is hereby GRANTED; and

3. That the Clerk of the Court shall mail or transmit copies of the foregoing memorandum and this order to all counsel of record.

/s/
William M. Nickerson
Senior United States
District Judge

(3)

No. 06-306

FILED
DEC 26 2006
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SUPREME COURT, U.S.

In The

Supreme Court of the United States

MARIANNE SAWICKI,

Petitioner,

v.

MORGAN STATE UNIVERSITY
and STATE OF MARYLAND,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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ARGUMENT

THIS CASE PRESENTS AN APPROPRIATE VEHICLE FOR RESOLVING THE QUESTION PRESENTED

Petitioner submits this supplemental brief pursuant to Rule 15.8 of this Court. Petitioner's reply brief was filed on November 14, 2006. The instant case was initially considered at the conference of December 1, 2006, and has now been redistributed for the conference of January 5, 2007. On December 18, 2006,[1] the petitioner in *BCI Coca-Cola v. EEOC*, No. 06-431, filed a reply brief which argued, inter alia, that the Court should not grant review in *Sawicki*.[2] The arguments advanced in that December 18 reply brief in *BCI Coca-Cola* were not raised by the respondent in *Sawicki* itself, and thus were not available at the time when Sawicki's earlier reply brief was filed. This supplemental brief is limited to addressing those new arguments.

BCI argues that the lower court in *Sawicki* "actually decided to dismiss the plaintiff's Title VII *claims* on multiple grounds." (BCI Reply Brief, p. 6) (emphasis added). The question presented in *Sawicki* concerns only one of those Title VII claims: whether the employer can be held liable under Title VII for discrimination by two lower level supervisors, the Chair and Dean? BCI does not actually contend that the Title VII claim based on discrimination by the Chair and Dean was rejected "on

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[1] A copy of that Reply Brief was provided to counsel for petitioner Sawicki on December 21, 2006, by electronic transmission.

[2] Petitioner's Reply Brief, *BCI Coca-Cola v. EEOC*, No. 06-341 (hereinafter "BCI Reply Brief"), pp. 6-9.

multiple grounds." To the contrary, the only basis on which the courts below dismissed the claims regarding the Chair and Dean was the disputed rule in *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277 (3d Cir. 2004) (en banc).[3] (Pet. App. 19a, 22a).

The other "multiple grounds" referred to by BCI were relied on by the courts below in resolving a quite distinct Title VII claim: the contention that two other higher officials, the President and Vice-President, had also discriminated against Sawicki. The courts below acknowledged that even under *Hill* the employer was responsible for the actions of the President and Vice-President, but concluded that there was insufficient evidence of discrimination by those two officials. It was solely with regard to the Title VII claim regarding the President and Vice-President (not the claim regarding the alleged discrimination by the Chair and Dean) that the courts below engaged in "a single motive analysis under *McDonnell Douglas Corp. v. Green* . . . and . . . a mixed motive analysis under *Desert Palace, Inc. v. Costa*." (BCI Reply Brief 6; see Pet. App. 22a-23a, 32a). And it was only in analyzing the evidence regarding the motives of the President and Vice-President that the courts below considered the Fourth Circuit's admonition regarding tenure disputes. (BCI Reply Brief 7; see Pet. App. 23a, 24a, 32a). The courts below had no reason to rely on these considerations in rejecting the claims related to the Chair and Dean because

[3] Similarly, in the litigation below the respondent relied solely on *Hill* in opposing the Title VII claim advanced by Sawicki regarding discrimination by the Chair and Dean.

under *Hill*, even conceded discrimination by the Chair and Dean would not give rise to Title VII liability.[4]

BCI objects that in the Fourth Circuit Sawicki's appeal "was pro se and involved a myriad of issues." (BCI Reply Brief, 7). But BCI does not actually contend that Sawicki failed to raise in the court of appeals the question presented set out in the petition. To the contrary, in the litigation before the panel, Sawicki expressly objected to the action of the district court in relying on *Hill* to dismiss her Title VII claim regarding discrimination by the Chair and Dean.[5] The panel that initially heard this case, of course, was bound by the Fourth Circuit's earlier en banc decision in *Hill*. Following the issuance of the panel decision, Sawicki filed a petition for rehearing en banc expressly urging the Fourth Circuit to abandon the rule in

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[4] BCI argues:

> Although it relied upon the district court's "reasoning," the Fourth Circuit did not explain whether, and to what degree, that included the teacher-tenure rule, the *McDonnell Douglas* analysis, the mixed motive analysis, *or* the district court's discussion of *Hill*.

(BCI Reply Brief 8) (emphasis added).

This argument would make sense only if the district court had rejected the discrimination claim regarding the Chair and Dean on four *alternative* grounds: *Hill*, *McDonnell Douglas*, the mixed motive analysis, and the teacher-tenure standard. It is clear, however, that *Hill* was the only basis given by the district court for rejecting that claim.

[5] Appellant's Informal Brief, *Sawicki v. Morgan State University*, No. 05-1891 (4th Cir.), pp. 4-5. This is the first issue set out in Sawicki's appellate brief. Morgan State, in its responsive brief, insisted that under *Hill* the district court properly concluded that any discrimination by the Chair and Dean was legally irrelevant. Appellee's Informal Brief, *Sawicki v. Morgan State University*, No. 05-1891 (4th Cir.), pp. 4-5.

Hill.[6] That rehearing petition, although written by a non-attorney, presented a clear and cogently framed argument against the holding in *Hill*. Sawicki's rehearing petition in the court of appeals argued that the decision in *Hill* conflicted with the decisions in numerous circuits, relying on many of the same decisions subsequently cited by counsel for petitioner in *BCI Coca-Cola v. EEOC*.[7]

BCI objects that the decision of the Fourth Circuit below contains "no appellate court analysis of the subordinate bias liability standard." (BCI Reply Brief, p. 8). But BCI does not contend that there is any uncertainty regarding what standard was applied below. To the contrary, the panel in this case – like every panel in the Fourth Circuit since the 2004 en banc decision in *Hill* – was constrained to apply the specific standard established by *Hill* itself. The certiorari petition in *BCI Coca-Cola v. EEOC* explains at length, and correctly, that *Hill* announced the definitive

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[6] Appellant's Petition for Rehearing of Appeal or Rehearing En Banc, *Sawicki v. Morgan State University*, No. 05-1891 (4th Cir.), pp. 1-10.

[7] *Compare* Appellant's Petition for Rehearing of Appeal or Rehearing En Banc, *Sawicki v. Morgan State University*, No. 05-1891 (4th Cir.), pp. 2-6, *with* Petition for Writ of Certiorari, *BCI Coca-Cola v. EEOC*, No. 06-341, pp. 7, 8, 10, 11, 15-18.

The circuit court decisions conflicting with *Hill* that were cited in both the petition for rehearing in *Sawicki* and the petition for writ of certiorari in *BCI Coca-Cola* were *Russell v. McKinney Hospital Venture*, 235 F.3d 219 (5th Cir. 2000), *Willis v. Marion County Auditor's Office*, 118 F.3d 542 (7th Cir. 1997), *Lust v. Sealy, Inc.*, 383 F.3d 580 (7th Cir. 2004), *Griffin v. Washington Convention Center*, 142 F.3d 1308 (D.C. Cir. 1998), and *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46 (1st Cir. 2000).

Fourth Circuit subordinate bias liability standard.[8] In the Fourth Circuit both parties filed briefs acknowledging the *Hill* standard. That standard was well known to the panel, two of whose members had participated in the en banc decision in *Hill* itself. So long as a question presented was clearly raised in the proceedings below, even by a pro se litigant, the absence of a detailed appellate opinion is no barrier to consideration by this Court. *Compare Gideon v. Wainwright*, 372 U.S. 335 (1963), *with Gideon v. Cochran*, 135 So.2d 746 (Fla. 1961) ("Habeas corpus denied without opinion").

BCI objects that neither court below "discussed the level of influence" that the biased subordinates had in this case. (BCI Reply Brief, p. 8). But the core holding of *Hill* itself is that "the level of influence" of a biased subordinate is legally irrelevant, because mere influence (or even causation) by a biased subordinate cannot give rise to Title VII liability. *Hill*, 354 F.3d at 291. For that reason neither *Hill* nor any decision applying *Hill* contains any such discussion; under *Hill* a court is precluded from even considering that issue. On the other hand, the *record* in this case contains clear – and at this point undisputed – factual allegations regarding the manner in which the biased subordinates – the Dean and Chair – influenced the decisions to deny tenure to and then to dismiss Sawicki. That record thus provides a well-defined context within which to decide the standard of liability for biased subordinates.

It is somewhat unusual for the petitioner in one case to argue at length that the Court should not grant review

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[8] Petition for Writ of Certiorari, *BCI Coca-Cola v. EEOC*, No. 06-341, pp. 9-11.

in another case. In the instant situation, however, BCI has an understandable interest in persuading the Court to grant only the petition in *BCI Coca-Cola v. EEOC*. In the proceedings below in *BCI Coca-Cola v. EEOC*, the EEOC endorsed the Fifth Circuit liability standard. But in this Court, the position of the United States will be determined by the Solicitor General, not the EEOC. In its Reply Brief, BCI notes optimistically that the Solicitor General's brief in opposition in *BCI Coca-Cola* did not endorse the Fifth Circuit, or the related Tenth Circuit, standard. (BCI Reply Brief, p. 9). That silence, BCI urges, must mean that the Solicitor General has concluded that the Tenth Circuit standard is not correct.[9] If certiorari were granted in *BCI Coca-Cola v. EEOC*, BCI suggests, the Solicitor General's position on the merits of the question at issue will reflect the interests of the federal government "as a public employer." (BCI Reply Brief, pp. 9-10).

BCI's argument in this regard is not without substance. Whenever the government files a brief in this Court regarding the interpretation of Title VII, the Solicitor General must weigh the interests of the federal government as a defendant in Title VII cases as well as the interests of the EEOC, which is charged with enforcing that statute. On a number of occasions the Solicitor General in such cases has expressly rejected the position of the EEOC. *E.g.*, *Burlington Northern & Santa Fe Rwy. v. White*, 126 S.Ct. 2405 (2006). It would undeniably be advantageous for BCI if, following a grant of certiorari in

[9] "Had the Respondent believed that, on remand, the trial of this case would be conducted using the correct standard, then surely that argument – and the reasons therefore – would have been made." (BCI Reply Brief, p. 9).

BCI Coca-Cola alone, the United States were to join BCI in endorsing the Fourth Circuit rule in *Hill*. But such a non-adversarial proceeding would not provide an appropriate context in which to resolve the question presented in this case and *BCI Coca-Cola*.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the court of appeals.

Respectfully submitted,

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No. 06-306

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In The

Supreme Court of the United States

MARIANNE SAWICKI,

Petitioner,

v.

MORGAN STATE UNIVERSITY
and STATE OF MARYLAND,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

THIS CASE PRESENTS AN APPROPRIATE VEHICLE FOR DECIDING THE QUESTION PRESENTED

(1) Respondents do not deny the existence of the inter-circuit conflict described in the petition. They question only the appropriateness of the instant case as a vehicle for deciding that important issue.

In the instant case, MSU's ultimate decisionmakers – the President and VPAA – acted in reliance on the recommendations of and on the basis of information provided by two lower ranking supervisors, the Dean and Chair. The Brief in Opposition suggests that the courts below concluded that there was no evidence that either the Dean or Chair acted with any discriminatory motive. Respondents do not claim, however, that there were any exculpatory findings that actually refer to the Dean and Chair;[1] rather, respondents point to general language in the opinions below, and invite the Court to conclude that the lower courts were referring to the Dean and Chair.[2] In light of

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[1] There are just such express findings in the district court opinion regarding the motives of the President and VPAA. Pet. App. 26a ("Plaintiff's allegations against the President do not raise a reasonable inference of unlawful discrimination by him. . . ."), 29a ("The VPAA's review of Plaintiff's tenure application does not raise a reasonable inference of discrimination.")

[2] The Brief in Opposition contains one less cautiously phrased statement which appears actually to assert that the courts below concluded there was no evidence that *anyone* – which would have to include the Chair or Dean – had ever engaged in any discrimination.

> [A]s both courts below determined, the extensive record developed in this case does not support an inference that Ms. Sawicki was a victim of race or gender discrimination.

(Continued on following page)

those supposed findings regarding the Dean and Chair, respondents argue, the resolution of the Question Presented cannot "alter the outcome of this case." (Br. Opp. 6).

These arguments do not accurately depict the decisions of the courts below. The lower courts never made any ruling at all regarding the motives of the Dean and Chair; to the contrary, the lower courts – at the urging of respondents – expressly declined to do so, concluding instead that any discriminatory purpose or actions on the part of the Dean and Chair was legally irrelevant. The linchpin of those decisions – and the reason why the Question Presented is of central importance in this case – was the conclusion of the lower courts that under the Fourth Circuit's controlling decision in *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277 (4th Cir. 2004) (en banc), *cert. dismissed*, 543 U.S. 1132 (2005), any "discriminatory behavior of the Chair and Dean is immaterial." (Pet. App. 24a).[3] The district court expressly did not

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(Br. Opp. 2). The lower courts never made – indeed, were never asked to respondents to make – any such determination regarding the motives of the Chair and Dean.

[3]The Brief in Opposition includes the following statement:

> As examples of alleged discrimination, [petitioner] points to various actions on the part of the Chair and, to some extent, the Dean, the VPAA and the President . . . The district court rejected those arguments. . . .

(Br. Opp. 4). It is clear, however, that the district court rejected those arguments on two distinct grounds. The district court rejected the allegation of discrimination by the President and VPAA for lack of evidence; the court rejected the allegation of discrimination by the Chair and Dean, however, not for want of evidence, but solely because it believed that under *Hill* any discrimination by the Chair and Dean was legally irrelevant.

evaluate the evidence of discrimination on the part of the Chair or Dean, because

> [p]roperly applying *Hill's* actual decisionmaker test to Defendant MSU's multi-tiered tenure application process shelters the alleged discriminatory acts of Plaintiff's immediate supervisors from this Court's analysis. . . .

(Pet. App. 20a).

Respondents state that

> The district court . . . determined that Ms. Sawicki "has not created a triable issue" on whether the University's decisionmakers "acted with unlawful discriminatory animus when they denied her tenure application. . . ."

(Br. Opp. 4). The quoted passage, however, refers only to triable issues of fact regarding the motives of the so-called university "decisionmakers." The district court made absolutely clear that this quoted determination did *not* refer to the claims of discriminatory animus on the part of the Chair and Dean. "Applying *Hill* to these facts, it is clear that only the President and VPAA can be considered the actual decisionmakers. . . . Under *Hill*, neither the Chair nor Dean can reasonably be considered actual decisionmakers." (Pet. App. 21a) (footnote omitted).[4]

Respondents quote the following excerpt from the district court opinion:

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[4] The passage in the district court opinion specifically refers to the lack of a triable issue regarding the "actual decisionmakers" (Pet. App. 32a), a phrase of art under *Hill*. Respondent's paraphrase of the district court opinion omits the term "actual."

> no reasonable juror could find that the circumstances surrounding Plaintiff's tenure denial amount to unlawful discrimination or otherwise conclude that discrimination played a role in the tenure denial.

(Br. Opp. 4, 5) (*quoting* Pet. App. 32a). But this excerpt has been edited to omit the key prefatory language (italicized below), which makes clear that the district judge was applying *Hill*, and thus was referring only to whether discrimination played a role in the actions of the university's President and VPAA.

> *Heeding . . . the recent en banc holding in Hill*, this Court concludes that no reasonable juror could find that the circumstances surrounding Plaintiff's tenure denial amount to unlawful discrimination or otherwise conclude that discrimination played a role in the tenure denial.

(Pet. App. 24a) (emphasis added). In the three sentences that follow this statement, the district court emphasized that because of *Hill* the court would not even consider evidence of discrimination on the part of the Chair and Dean.

> While the Plaintiff alleges innumerable indicia of discrimination, the Court will address only those necessary to resolve the case. Under *Hill's* actual decisionmaker the alleged discriminatory behavior of the Chair and Dean is immaterial if it cannot be imputed to the actual decisionmakers, here the President and VPAA. While Plaintiff's complaint and opposition are brimming with allegations of discriminatory behavior by her immediate supervisors, there is little in the record to suggest that either decisionmaker should have been on notice of either supervisor's allegedly

> disparate treatment of Plaintiff (or any underlying discriminatory animus towards whites or women) at the time they made the[ir] decision. . . .

(Pet. App. 24a-25a).

The courts below did not consider the evidence regarding discrimination by the Chair and Dean for another, equally compelling reason: the summary judgment motion filed by respondents never questioned the sufficiency of the evidence that the Chair and Dean had engaged in invidious discrimination. To the contrary, the central contention of the respondents in the courts below was that it was simply irrelevant whether the Chair or Dean had engaged in discrimination on the basis of race or sex. (See Petition, pp. 6-7 and nn.15-16). Respondents' narrowly framed summary judgment motion did not ask the lower courts to consider, or call upon petitioner to present, evidence regarding the motives of the Chair and Dean. That motion was carefully framed instead to dispute only the sufficiency of the evidence regarding the motives of the President and VPAA. Respondents cannot at this stage in the litigation raise a new fact-bound contention which was never presented to the courts below.[5]

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[5] Although the sufficiency of the evidence of discrimination by the Chair and Dean is not before this Court, just as it was not before the courts below, we note that respondents substantially overstate the assertedly exculpatory evidence.

Respondents suggest that Sawicki had a consistently negative relationship with students. (Br. Opp. pp. i, 2-3). As the district court noted, however, the issue about Sawicki's relations with students was largely limited to a dispute about Sawicki's efforts in a single class to enforce MSU's own rules regarding attendance and eating in the classroom. (Pet. App. 4a). MSU officials had upheld Sawicki's actions in

(Continued on following page)

This case presents a classic illustration of the ways in which a discriminatory lower ranking supervisor can cause his supervisors to dismiss an employee. The complaint and supporting materials assert that the Chair and Dean provided false adverse information regarding Sawicki, withheld favorable information about her, and recommended a denial of tenure, all for the purpose of discriminating against Sawicki because of her race and sex. MSU argues that the other officials who relied on the tainted record and recommendations were persuaded by the Chair and Dean that tenure should not be granted. (Br. Opp., pp. i, 1-3) But that agreement, far from showing that the Chair and Dean were innocent of any discriminatory purpose, merely demonstrates the effectiveness of their discriminatory conduct.

(2) Another petition raising the same issue as the instant case is now pending before the Court.[6] *BCI*

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that instance. (Pet. App. 6a). The record included a substantial body of laudatory statements about Sawicki from MSU students. (Pet. App. 8 n.3).

Respondents suggest that Sawicki had negative relations with several colleagues in her department. (Br. Opp. pp. i, 1-2). This assertion rests solely on declarations from college officials prepared, years after the denial of tenure, for this litigation. D.Ex. 67 (dated Feb. 7, 2005), D.Ex. 69 (dated Feb. 11, 2005). The contemporaneous records of the tenure decisionmaking process contain no reference to any such problem or concern. Aside from the Chair, no one in the tenure decisionmaking was even in Sawicki's department.

[6] The Question Presented in *BCI Coca-Cola* is as follows:

> Under what circumstances is an employer liable under federal anti-discrimination laws based on a subordinate's discriminatory animus, where the person(s) who actually made the adverse employment decision admittedly harbored no discriminatory motive toward the impacted employee.

Petition for Writ of Certiorari, *BCI Coca-Cola v. EEOC*, No. 06-341, p. i.

Coca-Cola Bottling Co. v. EEOC, No. 06-341. The brief in opposition in *BCI Coca-Cola* is due on December 8, 2006.[7] If the brief in opposition is filed on that date, the petition and response in *BCI Coca-Cola* will be distributed to the Court on December 20, 2006 for consideration at the conference of January 5, 2007.

The instant case provides a more appropriate vehicle for deciding the legal issue in question than does *BCI Coca-Cola*. *BCI Coca-Cola* is an interlocutory appeal, a circumstance which ordinarily militates against granting review. R. Stern, E. Gressman, S. Shapiro & K. Geller, Supreme Court Practice, 258-61 (8th ed. 2002) (citing cases). The petitioner in *BCI Coca-Cola* insists that the management decision to dismiss the worker involved was *not* caused by any action on the part of the assertedly biased lower ranking supervisor.[8] If petitioner is correct, it

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[7] The United States has asked for and received two 30-day extensions of time for the filing of this brief.

[8] Petitioner in *BCI Coca-Cola* contends that the higher ranking supervisor who actually made the disputed dismissal decision conducted an "independent investigation" of the relevant facts. (*BCI Coca-Cola* Petition, p. 5). Petitioner in *BCI Coca-Cola* also notes that

> [i]t is . . . undisputed that [the subordinate supervisor in that case] was never asked for his opinion as to what should happen [to the alleged discrimination victim], never recommended termination, and, in fact, never made any comments or suggestions at all other than asking [the higher ranking supervisor's] advice on how to handle the situation and reporting to her what had occurred.

(*BCI Coca-Cola* Petition, p. 3).

This situation contrasts with the undisputed facts of the instant case. In this case the higher ranking supervisors (the VPAA and President) concededly made no investigation of their own, had no direct knowledge of any of the relevant facts, and relied instead on the information and recommendation provided by the very lower level

(Continued on following page)

will prevail at trial regardless of how this Court resolves the extent of an employer's liability for discrimination by a lower ranking supervisor.

In light of the posture of these two cases, we urge that the Court at this time grant certiorari in the instant case. When the petition in *BCI Coca-Cola* comes before this Court, the Court should defer action on that petition pending the decision on the merits in the instant case. Should the Court proceed in this manner, we will consent to the filing of an amicus brief by BCI Coca-Cola, and (if the Solicitor General files a brief in support of petitioner Sawicki and so requests) will agree to a divided argument with the Solicitor General. Under Rule 37.4 of this Court, the Solicitor General will of course be entitled as of right to file an amicus brief in the instant case on behalf of the United States and the EEOC.

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officials (the Chair and Dean) whose allegedly discriminatory motives are the basis for petitioner Sawicki's appeal. (*Sawicki* Petition, pp. 3-6).

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the court of appeals. In the alternative, the Court should defer action on the petition until the conference at which the petition in *BCI Coca-Cola v. EEOC* is taken up for consideration.

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